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## Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores

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### Recommended Citation

Sarah B. Schindler, Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Government and Locavores, 87 Tul. L. Rev. 231 (2012).

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### Publication Statement

Originally published as Sarah B. Schindler, Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Government and Locavores, 87 Tul. L. Rev. 231 (2012).

# TULANE LAW REVIEW

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VOL. 87

DECEMBER 2012

No. 2

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## Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores

Sarah B. Schindler\*

*“Locavores” aim to source their food locally. Many locavores are also more broadly concerned with living sustainably and decreasing reliance on industrial agriculture. As more people have joined the locavore movement, including many who reside in urban and suburban areas, conflict has emerged between the locavores’ desires to use their private property to produce food—for personal use and for sale—and municipal zoning ordinances that seek to separate agriculture from residential uses.*

*In this Article, I consider the evolution of this conflict and its implications for our systems of land use, local government, and environmental law. Specifically, I investigate the police power rationales for the existence of ordinances that disallow urban homesteading in urban and suburban communities. I then demonstrate that public health, civic virtue, and free market principles can be used to justify the passage of ordinances that would expressly permit these behaviors. Central to this analysis is a discussion of the problems caused by industrial agriculture and the lack of access to locally produced foods—food insecurity, food deserts, obesity tied to processed foods, monoculture-induced environmental catastrophes, harm to animals, and greenhouse gas emissions—all of which could be alleviated, at least in part, through urban agriculture. In recognition of these changing conceptions of harm, some local governments have begun to pass ordinances expressly allowing gardens, chickens, and the sale of produce in residential areas. I conclude by considering what this movement toward loosening*

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\* © 2012 Sarah B. Schindler. Associate Professor of Law, University of Maine School of Law. J.D., University of Georgia School of Law; A.B., University of Georgia. I am grateful to Jennifer Wriggins, Keith Hirokawa, Jonathan Rosenbloom, Stephen Miller, Michael Lewyn, Dave Owen, Dmitry Bam, Karen Bradshaw, Pamela Vesilind, Orlando Delogu, Wells Lyons, and Marya Baron for their helpful comments. Thanks also to the participants of the 2011 Colloquium on Environmental Scholarship at Vermont Law School; the 2012 Association of Law, Property, and Society at Georgetown University; and the 2012 Northeast Regional Scholarship and Teaching Development Workshop at Albany Law School. Special appreciation to the Humane Society of the United States for use of the Shin Pond property and to Erin Dooling for outstanding research assistance.

*restrictions on the use of private property says more broadly about the decline of Euclidean zoning controls and the future of land use law.*

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## I. INTRODUCTION

In the quiet Detroit suburb of Oak Park, Michigan, Julie Bass was brazenly breaking the law. An inspection of the crime scene would reveal no assault rifles or illicit drugs, but rather a shovel, raised planting beds, and some seeds. Bass faced ninety-three days of jail time for planting a vegetable garden in her front yard and for refusing to comply with the city's demand to remove it.<sup>1</sup>

Bass's situation is not unique. Throughout the country, antiquated land use ordinances restrict homeowners and renters from undertaking practices such as raising chickens for eggs, planting gardens in front of their homes, or selling produce they have grown.<sup>2</sup> These forbidden practices fall into a broader category of activities and movements with many names and variations: "urban homesteading,"<sup>3</sup> "locavorism,"<sup>4</sup> "relocalization,"<sup>5</sup> "urban agriculture,"<sup>6</sup> "recession gardening,"<sup>7</sup> "food

1. Bass received a code-enforcement ticket, followed by a misdemeanor charge. *Internet Buzz: Concept of Jail Time for Growing a Vegetable Garden*, MYFOXDETROIT.COM (July 12, 2011), <http://www.myfoxdetroit.com/story/18456719/internet-buzz-concept-of-jail-time-for-growing-a-vegetable-garden>. The city did not believe her garden was "suitable live plant material," which was the only permissible use of a front yard other than for grass or shrubs. See OAK PARK, MICH., CODE § 1716(A)(5) (2012) ("All unpaved portions of the site shall be planted with grass ground cover, shrubbery, or other suitable live plant material.").

2. See Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002) ("Almost a century later, local governments are finding themselves limited by zoning schemes authorized by state statutes that were enacted prior to television, computers, sports utility vehicles and massive investments in the built-up infrastructure."); Angie Basiouny, *One Backyard Bounty Ruffles Some Feathers*, NEWS J., Sept. 23, 2009 ("[D]ozens of local governments nationwide [are] dealing with the intersection of lifestyle and land use as a recession-fueled interest in urban farming collides with strict laws originally drafted to keep neighborhoods clean and tidy.").

3. Mary Wood et al., *Promoting the Urban Homestead: Reform of Local Land Use Laws To Allow Microlivestock on Residential Lots*, 37 ECOLOGY L. CURRENTS 68, 69 (2010) (defining "urban homesteading" as the "effort of transforming the urban or suburban yard into a food-producing lot").

4. *Top Twelve Reasons To Eat Locally*, LOCAVORES, <http://www.locavores.com/how/why.php> (last visited Nov. 27, 2012) (explaining the reasons that locavores choose to source their food locally).

5. Jeffery M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT'L L. 807, 859 (2002) ("Relocalization . . . stresses the primacy of local initiatives to combat the adverse effects of globalization." (footnote omitted)).

sovereignty,”<sup>8</sup> and “regional foodsheds.”<sup>9</sup> The reasons for these restrictive ordinances vary. Some have been in place since Euclidean zoning and land use ordinances were first created, with a purpose of separating and isolating residential uses from agricultural uses.<sup>10</sup> In other jurisdictions, these practices fall as the incidental victims of neighborhood uniformity and aesthetic demands for neat and tidy front lawns.<sup>11</sup> Bans on raising farm animals within city limits often stem from nuisance-related concerns about noise and odor.<sup>12</sup>

However, as greater numbers of individuals become interested in sustainable lifestyles, the allure of urban homesteading is growing. Many people want to feed themselves and their families without burning oil by driving to the grocery store or spending money on food

6. Katherine H. Brown & Anne Carter, *Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe*, CMTY. FOOD SEC. COAL. 3 (Oct. 2003), <http://www.foodsecurity.org/PrimerCFSCUAC.pdf> (“Urban agriculture . . . is the growing, processing, and distribution of food and other products through intensive plant cultivation and animal husbandry in and around cities.” (emphasis omitted)).

7. *Recession Gardens Sprouting Up*, WASH. TIMES (Mar. 17, 2009), <http://www.washingtontimes.com/news/2009/mar/17/recession-gardens-sprouting-up> (defining “recession gardening” as “cultivating vegetables in . . . backyards to squeeze every penny out of . . . food budgets”).

8. Deirdre Fulton, *Free Our Food: Small Farmers Demand Independence from Agrobusiness Industry Rules*, PORTLAND PHOENIX (May 4, 2011), <http://portland.the phoenix.com/news/120146-free-our-food/> (“[The] ‘food sovereignty’ movement [is] aimed at restoring the direct relationship between food producers and consumers, while reducing government interference in local food systems.”).

9. Patricia E. Salkin & Amy Lavine, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 FORDHAM ENVTL. L. REV. 599, 600 (2011) (defining “regional foodsheds” as “geographic area[s] in reasonably close proximity to where an urban community receives agricultural commodities”).

10. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (upholding the constitutionality of comprehensive zoning); see *infra* note 97 and accompanying text (describing Euclidean zoning).

11. These requirements may be imposed by zoning ordinances but are also often found in private restrictive covenants, termed “covenants, conditions, and restrictions” (CC&Rs), which control numerous neighborhoods that are governed by private homeowners’ associations. See Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1527 (1982); Stephen R. Miller, *Building Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. (forthcoming 2013). CC&Rs’ role in the urban agriculture debate is addressed *infra* Part V.A. See also LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 485 (1961) (discussing the “hygienic superiority” of the lawn).

12. See, e.g., Mary Christina Wood et al., Sustainable Land Use Project, *Reform of Local Land Use Laws To Allow Microlivestock on Urban Homesteads*, UNIV. OF OR. SCH. OF LAW 13 (2010), <https://www.law.uoregon.edu/assets/facultydocs/mwood/microlivestock.pdf> (“Cities have generally prohibited microlivestock because they are considered ‘farm animals.’ An individual who wanted such an animal would have to buy a farm. That notion, however, runs counter to the growing interest of citizens in making full use of their privately owned property to provide for healthy food and family self-sufficiency.”).

that required large amounts of fossil fuels to produce and transport.<sup>13</sup> This is a key tenet of the “locavore” movement: eat food—preferably organic—that is grown close to where one lives and is in season.<sup>14</sup> Locavores’ goals include reducing their carbon footprint by reducing their reliance on industrial agriculture and oil-based food production, supporting their local economy, avoiding genetically modified foods, reducing ingestion of residual fertilizers and pesticides, saving money, supporting fair treatment of farm laborers and humane treatment of farm animals, and teaching others about food origins.<sup>15</sup> These goals are lofty, but there is historical evidence that individual actions can have a global impact. During World War II, people grew “victory gardens” that produced 40% of the produce consumed in the United States.<sup>16</sup>

Many urban agriculture bans stemmed from early zoning ordinances that took hold in urban and suburban areas. Localities used their police powers, acting in the interest of the public health, safety, welfare, and morals, to zone agricultural uses out of residential areas. Although bans on urban agricultural practices are still common, many municipalities are looking for ways to encourage better health and increase “green” economic development.<sup>17</sup> Now, as conceptions of

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13. See *infra* Part IV.A.2.a. But cf. *infra* note 227 and accompanying text (discussing studies that refute the importance of environmental concerns).

14. “Locavore” was chosen as the Oxford University Press “word of the year” in 2007. *Oxford Word of the Year: Locavore*, OUPBLOG (Nov. 12, 2007, 7:08 AM), <http://blog.oup.com/2007/11/locavore/>.

15. See, e.g., STEVE MARTINEZ ET AL., U.S. DEP’T OF AGRIC., LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES 2 (2010), available at [http://www.ers.usda.gov/media/122868/err97\\_1\\_1.pdf](http://www.ers.usda.gov/media/122868/err97_1_1.pdf) (articulating reasons for locavorism, including reducing reliance on industrial agriculture, supporting local economies, avoiding pesticides, supporting fair labor practices and animal welfare, and learning about the roots of food); Marian Burros, *Preserving Fossil Fuels and Nearby Farmland by Eating Locally*, N.Y. TIMES (Apr. 25, 2007), <http://www.nytimes.com/2007/04/25/dining/25loca.html> (describing the process for selecting foods that are in season and grown close to a person’s residence, reducing reliance on industrial agriculture); John Cloud, *Eating Better than Organic*, TIME (Mar. 2, 2007), <http://www.time.com/time/magazine/article/0,9171,1595245,00.html> (discussing the virtues of eating close to home, reducing the number of food miles consumed, reducing exposure to pesticides, and learning about where food originates); *Guidelines for Eating Well*, LOCAVORES, <http://www.locavores.com/how/> (last updated Dec. 2, 2010) (advising individuals to eat local and organic produce when possible); *‘Recession Gardens’ Sprouting Up*, *supra* note 7 (observing that gardens save money); *Top Twelve Reasons To Eat Locally*, *supra* note 4 (suggesting that reducing one’s carbon footprint, supporting local economies, and reducing ingestion of chemicals are reasons to eat locally).

16. Greening Food Deserts Act, H.R. 4971, 111th Cong. § 2(a)(20) (2010); AMY BENTLEY, *EATING FOR VICTORY: FOOD RATIONING AND THE POLITICS OF DOMESTICITY* 117 (1998); DARRIN NORDAHL, *PUBLIC PRODUCE: THE NEW URBAN AGRICULTURE* 136 (2009).

17. Nina Mukherji & Alfonso Morales, Am. Planning Ass’n, *Zoning for Urban Agriculture*, ZONING PRAC., Mar. 2010, at 2 (“As sustainability has moved up the municipal

harm are changing, localities can use those same police powers that originally justified bans on urban agriculture to instead justify more permissive uses of residential property for agricultural purposes to further broader public health and welfare goals. To those ends, some localities have recently put in place ordinances that proactively address and govern urban agriculture practices.<sup>18</sup>

Importantly, the elimination or loosening of bans on urban agriculture exemplifies a broader trend in land use law: in pursuit of sustainable development, some local governments are beginning to move away from restrictive zoning ordinances. This trend is visible in the implementation of smart growth and new urbanist policies, form-based codes, and the rise of mixed-use zoning ordinances.<sup>19</sup> Furthermore, the movement toward permissive municipal views of urban agriculture illustrates a perennial issue in land use policy: how to allocate control over land use between municipal governments and private property owners.<sup>20</sup> Urban agriculture presents an example of some governments and citizens agreeing that, at least with respect to certain agricultural uses, and as long as certain prescriptive controls remain in place, private landowners should be able to use their property free from the constraints of severe public regulation. As Robert Ellickson and Vicki Been point out:

Few observers approach this issue free of ideological baggage. Stalwarts of public regulation regard government as an essential check on the environmental damage that self-interested landowners might cause if left alone . . . . Stalwarts of markets, by contrast, regard public regulation as a coercive system that commonly makes urban outcomes worse, not better.<sup>21</sup>

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agenda, cities have begun to take an interest in urban agriculture as a way to promote health, to support economic and community development, and to improve the urban environment?”).

18. *See generally id.*

[C]ities from Austin, Texas, to Little Rock, Ark., to Miami, New York City and Seattle have all recently changed land-use laws to permit urban agriculture. . . . The Charlottesville, Va., Goat Justice League persuaded city officials there to overturn a 30-plus-year-old law banning goatkeeping. The law evidently was passed after a rogue goat wreaked havoc in the city.

Arin Greenwood, *New Zoning Laws for New Neighbors—Meet the Goats Next Door*, A.B.A. J. (June 1, 2011, 2:10 AM), [http://www.abajournal.com/magazine/article/got\\_your\\_goat/](http://www.abajournal.com/magazine/article/got_your_goat/).

19. Form-based codes are zoning codes that are more concerned with a building's form and structure than its use. Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WIDENER L.J. 787, 833 (2007).

20. *See* ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES & MATERIALS* 31 (3d ed. 2005).

21. *Id.*



In many land use cases, supporters of fewer regulations are supporters of market forces. However, in the case of urban agriculture, it is often progressive and otherwise typically proregulatory forces—the “locavore liberals”—who have championed many of the ordinances that loosen restrictions. Thus the parties to the urban agriculture debate do not easily map onto the traditional, political, proregulation/antiregulation divide.

This Article focuses on individual homeowners and renters. It examines their desire to use private land in a way that supports sustainable urban agriculture and locavore policies and the existence of land use ordinances that govern those behaviors. Although there has been a limited scholarly discussion suggesting government involvement in the promotion of sustainable urban agriculture,<sup>22</sup> much of that discussion focuses on the use of surplus and underused public land and government aid in the creation of community gardens<sup>23</sup>—in other words, government as a source of land or money, rather than as a regulator. Legal scholars and the press are just beginning to pay attention to the more current issues raised in this Article.<sup>24</sup> Further, this Article sheds light on an area that is fundamentally misperceived by the community at large, local officials, and even some scholars who erroneously believe that people can freely use their private property for urban agricultural purposes without fear.<sup>25</sup>

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22. See, e.g., Kathryn A. Peters, Note, *Creating a Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203, 205 (2010) (“[I]t is imperative that the government, at federal, state, and local levels, establish policies that promote sustainable urban agriculture to ensure access to an adequate food supply produced with minimal impact on the environment.”).

23. NORDAHL, *supra* note 16, at 141; Neil D. Hamilton, *Greening Our Garden: Public Policies To Support the New Agriculture*, 2 DRAKE J. AGRIC. L. 357, 359 (1997); Peters, *supra* note 22, at 205.

24. For example, students at the University of Oregon School of Law recently authored a white paper urging reform of local land use ordinances to permit urban and suburban homeowners to keep “[m]icrolivestock such as chickens, ducks, geese, quail, turkeys, pygmy goats, a pig, rabbits, [or] bees” on their property for food production purposes. Wood et al., *supra* note 12, at 2 (“Because current code provisions tend to restrict these activities, however, cities responsive to their community’s growing interest in urban homesteading must revise their city codes to allow microlivestock on residential lots.”); see Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1, 18–40 (2011). See generally Salkin & Lavine, *supra* note 9 (discussing the effects of zoning and land use on public health).

25. See, e.g., Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225, 237 (2010) (“As a practical matter, gardening is permissible in any zoning district; a homeowner does not need zoning permission, for example, in order to raise vegetables.”). Plainly, this is not universally true. See *infra* Part II.

As issues surrounding sustainability and urban agriculture are becoming more important to many citizens, and current conceptions of what is harmful to a community are beginning to change, now is the time for municipalities to review their comprehensive plans and ordinances to create a united scheme addressing urban homesteading and the locavore lifestyle.<sup>26</sup> This Article is the first to comprehensively describe existing prohibitions on such uses; consider the justifications for overturning existing bans; propose an approach that municipalities can take in actively addressing the intersection between private property, urban agriculture, and locavorism in their communities; and situate this trend within the changing landscape of zoning more generally.<sup>27</sup>

In Part II, this Article provides examples of existing bans on urban agriculture, including bans on front yard gardens, the sale of produce, and chickens. Part III presents reasons that local governments initially enacted these bans pursuant to their police powers. These justifications include traditional methods of zoning, the promotion of public health and avoidance of nuisance, aesthetics, property values, and exclusion. Part III also briefly describes the historical role of farming in the context of land use and the prior legal regimes that were used to resolve conflicting uses of land. It demonstrates that though there were valid historical reasons for the enactment of bans, those reasons no longer apply to most communities.

Part IV provides justifications for reversal of these anachronistic bans and for municipal encouragement of urban homesteading practices. These include police powers, the pursuit of civic virtue, and free market and efficiency rationales. Part IV also critiques these bans via a discussion of the harms of industrial agriculture and the benefits of urban agriculture and locavorism, and thus provides municipalities factual data and normative analysis to back up a decision to support an urban agriculture scheme.

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26. In the past, “[h]ow local government policies affect[ed] and [were] affected by the food system [was] unclear. Consequently, we [did] not know enough to help us plan more comprehensively for the urban food system to enhance community food security.” Kameshwari Pothukuchi & Jerome L. Kaufman, *Placing the Food System on the Urban Agenda: The Role of Municipal Institutions in Food Systems Planning*, 16 AGRIC. & HUM. VALUES 213, 218 (1999). Today, municipalities are doing just that.

27. There has not yet been much successful planning of food systems at the urban or municipal level. See *id.* at 213 (“As urban and regional planners, we are struck by the piecemeal approach to planning for the food system at the urban level. We think the urban food system needs to be looked at more comprehensively . . . particularly through the assistance of the local planning agency.”).

Part V looks forward. It presents concrete solutions that municipalities can adopt to implement an urban agriculture program that allows citizens to use their land more productively. Part V concludes by addressing changing conceptions of harm and the broader implications that a loosening of restrictions on urban agriculture may have for land use law and the future of Euclidean zoning.

## II. URBAN AGRICULTURE BANS

### A. *Existing Bans on Vegetable Gardens and Produce*

Municipalities use a variety of approaches to ban urban homesteading practices in their communities. These generally include: (1) ordinances that prohibit the growth of vegetables or fruit in certain zones; (2) ordinances that only allow expressly permitted uses and that do not mention vegetable gardening; (3) ordinances that prohibit gardens in certain locations, such as the front yard, side yard, or median strip; and (4) ordinances that prohibit or limit the sale of produce.

#### 1. Prohibiting Growth in Certain Zones

One common ban prohibits a person from growing vegetables in certain zones, either entirely or without a discretionary permit. For example, the Los Angeles Municipal Code was amended in 1960 to prohibit the growth of crops in residential zoning districts and to prohibit on-site sale of produce.<sup>28</sup> However, if urban gardeners want to grow and then sell their produce off-site, such as at farmers' markets, they could pay \$15,000 to apply for a conditional use permit (CUP).<sup>29</sup>

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28. Prior to that time, farming had been allowed within certain zones of the city. CITY ATT'Y, CITY OF L.A., REPORT NO. R10-0128, TRUCK GARDENING ORDINANCE CATEGORICAL EXEMPTION NARRATIVE (2010) ("Prior to 1946, farming was allowed in the R1 zone with certain limitations. In 1946, permitted uses were expanded to include truck gardening. After 1960, farming was no longer allowed, but truck gardening remained an allowable use. . . . Therefore, the [Los Angeles Municipal Code] is self-contradictory in that it permits truck gardening without permitting the growth of virtually all produce."); see Sharon Cohoon, *Legalizing Urban Farming in LA—The Food & Flower Freedom Act*, SUNSET (Oct. 21, 2009), <http://web.archive.org/web/20101108234637/http://freshdirt.sunset.com/2009/10/legalizing-urban-farming-in-la-the-food-flowers-freedom-act.html> (accessed through the Internet Archive).

29. Raquel Maria Dillon, *Urban Gardeners Versus Zoning Laws*, CHRISTIAN SCI. MONITOR (Feb. 16, 2010), <http://www.csmonitor.com/The-Culture/Gardening/2010/0216/Urban-gardeners-versus-zoning-laws>.

Although this ordinance was subsequently revised,<sup>30</sup> on-site sales of produce from gardening are still prohibited.<sup>31</sup>

## 2. Only Allowing Expressly Permitted Uses

In other jurisdictions, very strict zoning ordinances only permit specific uses that are expressly described in the ordinance. Thus, if the ordinance does not expressly mention vegetable gardening, a person could be cited, fined, or eventually prosecuted for growing vegetables in that zone.<sup>32</sup> This recently happened to a gardener in Dekalb County, Georgia.<sup>33</sup> The Dekalb County Code contains a general prohibition that states, “No use of any land, building, structure or property shall be permitted unless expressly and specifically authorized in the district within which said use is located.”<sup>34</sup> Pursuant to that provision, the County cited the gardener for growing vegetables on his parcel, which was zoned “R-85”—a residential zone for which the Code does not list growing vegetables (on any scale) as an allowable use.<sup>35</sup>

## 3. Prohibiting Front Yard Gardens

Another common ban forbids a person from growing vegetables in their front yard.<sup>36</sup> Vegetable gardens are often viewed as an affront to “idealized” lawns,<sup>37</sup> which comprise approximately 18-million acres

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30. In advocating for revisions, supporters argued that allowing for growth of local foods and their sale at local farmers’ markets—without requiring an expensive, discretionary permit—was inherently tied to the city’s goals of greening the city, improving nutrition, and building community and a sense of place. *The Food & Flowers Freedom Act Needs Your Help*, URB. FARMING ADVOCS. (Oct. 9, 2009), [http://web.archive.org/web/20100829195540/http://urbanfarmingadvocates.org/posted\\_by\\_ufa/the-food-flowers-freedom-act-needs-your-help/](http://web.archive.org/web/20100829195540/http://urbanfarmingadvocates.org/posted_by_ufa/the-food-flowers-freedom-act-needs-your-help/) (accessed through the Internet Archive). Now, individuals can grow produce to be used on-site or to be sold off-site, without a permit. See, e.g., CITY OF L.A., CAL., MUN. CODE § 12.07(A)(6) (2012) (permitting truck gardening in suburban residential districts).

31. CITY OF L.A., CAL., MUN. CODE § 12.05(A)(16)(a)(19).

32. See, e.g., DEKALB CNTY., GA., CODE § 27-6 (2012); *County Sues Farmer, Cites Too Many Crops*, WSB-TV (Sept. 13, 2010, 10:00 AM), <http://www.wsbtv.com/news/news/county-sues-farmer-cites-too-many-crops/nFBrd/>.

33. *County Sues Farmer, Cites Too Many Crops*, *supra* note 32 (reporting that the farmer was cited for “growing too many crops for the zoning”).

34. DEKALB CNTY., GA., CODE § 27-63.

35. See *id.* §§ 27-163 to -164. Miller subsequently obtained a rezoning of his property to “R-200” (a single-family residential district), which expressly allows vegetable growing as a permitted use. See *County Sues Farmer, Cites Too Many Crops*, *supra* note 32; DEKALB CNTY., GA., CODE § 27-63.

36. See, e.g., BEDFORD, OHIO, CODIFIED ORDINANCES § 1341.19 (2012) (“No vegetable gardens shall extend beyond the front building line of the house.”).

37. See Loren B. Byrne, *Of Looks, Laws and Lawns: How Human Aesthetic Preferences Influence Landscape Management, Public Policies and Urban Ecosystems*, in

of land surrounding homes in the United States.<sup>38</sup> A front lawn embodies “a visible statement” that a person makes to their neighbors and the broader community.<sup>39</sup> This statement is often one that suggests uniformity, conformity, neatness, and normalcy.<sup>40</sup>

The press recently took interest in a front yard ordinance (FYO) in Sacramento, California. The ordinance, originally adopted in 1941, banned overgrown plants by stating that front yards “shall be landscaped, irrigated and maintained with primarily low groundcover or turf.”<sup>41</sup> Community members supportive of urban homesteading organized and convinced the city to revise the ordinance, which now permits front yards to contain landscapes including annuals, perennials, shrubs, and trees.<sup>42</sup> The new ordinance still requires that the growth be “mowed, trimmed, and/or maintained as often as necessary to prevent overgrowth and blight.”<sup>43</sup> Thus aesthetics and the prevention of blight, which could lead to a nuisance, are both of concern to the town in determining what belongs in a front yard.<sup>44</sup> The

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2005 EMERGING ISSUES ALONG URBAN/RURAL INTERFACES: LINKING SCIENCE AND SOCIETY 42, 42-46 (David N. Laband ed., 2005); *see also* Asmara M. Tekle, *Lawns and the New Watershed Law*, 95 MARQ. L. REV. 213, 214 (2011) (describing the “idyllic” lawn).

38. *See* Cristina Milesi et al., *Mapping and Modeling the Biogeochemical Cycling of Turf Grasses in the United States*, 36 ENVTL. MGMT. 426, 432 (2005) (“[I]t appears that turf grasses would represent the single largest irrigated ‘crop’ in the United States, occupying a total area three times larger than the surface of irrigated corn . . .”).

39. James Charles Smith, *The Law of Yards*, 33 ECOLOGY L.Q. 203, 211 (2006); *cf.* Tekle, *supra* note 37, at 213 (stating that there are currently “forty million acres of national front lawn” in the United States).

40. *See* Byrne, *supra* note 37, at 43 (explaining that houses set back from the street with front lawns “were meant to foster a sense of community and gave the front lawn stature as the symbol of a landowner’s contribution to keeping the community looking neat and orderly”).

41. SACRAMENTO, CAL., CITY CODE § 17.68.010(A)(1) (2012); *see* Cheyenne Cary, *Front Yard Ordinance Allows DIY Food*, SACRAMENTO PRESS (July 17, 2009), [http://www.sacramentopress.com/headline/10830/Front\\_yard\\_ordinance\\_allows\\_DIY\\_food](http://www.sacramentopress.com/headline/10830/Front_yard_ordinance_allows_DIY_food) (“The main concern of the old FYO was preventing overgrowth of plants, whether food or otherwise. It didn’t explicitly forbid food plants, but didn’t list them as legal either, whereas perennial grasses and decorative plants were listed as legal groundcover.”).

42. SACRAMENTO, CAL., CITY CODE § 17.68.010(A)(1)(b).

43. *Id.*; *Did You Know . . . Growing Vegetables in Your Front Yard Is Against the Law?*, SACRAMENTO CITIZENS FOR SUSTAINABLE LANDSCAPES, [http://www.web.archive.org/web/20070730210912/http://www.organicsacramento.org/fyg\\_DIDYOUKNOW.DOC](http://www.web.archive.org/web/20070730210912/http://www.organicsacramento.org/fyg_DIDYOUKNOW.DOC) (accessed through the Internet Archive) (last visited Nov. 27, 2012).

44. Antiweed ordinances are common and have been in existence for years. *See, e.g.*, *People v. McKendrick*, 468 N.W.2d 903, 906 (Mich. Ct. App. 1991) (quoting FERNDAL, MICH., CODE § 20-38) (defining weeds under the “noxious vegetation” ordinance as “all weeds, grass, brush, wildings, second growth, rank vegetation or other vegetation that is not growing in its proper place, having a greater height than seven (7) inches or spread of more than seven (7) inches”); *City of St. Louis v. Galt*, 77 S.W. 876, 876 (Mo. 1903) (prohibiting

revised ordinance is more prescriptive than proscriptive<sup>45</sup> and is a step toward a more permissive approach to locavore practices in urban areas.<sup>46</sup>

Another FYO that made headlines is located in Northbrook, Illinois. The Northbrook Zoning Code prohibits residents from growing anything in the front yard except “shade trees, ornamental trees, evergreen trees, shrubs, flowering plants, ground cover plants, and other native or ornamental grasses and plants.”<sup>47</sup> A Northbrook woman lacked sufficient sun in her backyard to grow vegetables, so she put a garden in her front yard instead.<sup>48</sup> Neighbors complained, and the planning department asked her to remove the garden.<sup>49</sup> Several months later, the Northbrook Village Board declared that front yard gardens are permitted under the existing Code, but set out guidelines for residents to follow in order to “promote properly maintained gardens, [and] not allow areas to fall into disrepair.”<sup>50</sup>

#### 4. Prohibiting or Limiting the Sale of Produce

Finally, some communities allow residents to grow vegetables on their property, but ban the sale of produce for commercial gain in residential areas.<sup>51</sup> For example, in Detroit, Michigan, which has begun a broad urban homesteading program, the zoning code prohibits an individual from selling home grown vegetables on-site.<sup>52</sup> This is

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weeds four to five feet tall, including sunflowers, under an antiweed ordinance enacted in 1900).

45. Proscriptive codes “restrict the kinds of development that can take place. [For example, t]hey specify minimum sizes of lots; the types of developments allowed in particular zones; the amount of parking required; and the width of standard streets.” Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1452 (2002). In contrast, “Prescriptive codes are designed to encourage a certain type and quality of development . . .” *Id.*

46. The ordinance is not fully permissive because it limits landscaping height to four feet in the front yard. SACRAMENTO, CAL., CITY CODE § 17.68.010(A)(1)(c). Thus certain climbing vegetables or tall plants might be prohibited in front yards.

47. NORTHBROOK, ILL., ZONING CODE § 9-107B(3) (2012).

48. Megan Graydon, *This Year's Harvest Could Be Last for Resident's Garden*, TRIBLOCAL (Aug. 23, 2010, 12:00 PM), <http://triblocal.com/northbrook/2010/08/23/this-years-harvest-could-be-last-for-residents-garden/>.

49. *Id.*

50. Jeff Danna, *Front-Yard Gardens OK, but There Are Guidelines To Follow*, TRIBLOCAL (Feb. 9, 2011, 11:12 AM), <http://triblocal.com/northbrook/2011/02/09/front-yard-gardens-ok-but-there-are-guidelines-to-follow/> (internal quotation marks omitted).

51. For another example of this type of ban, see CITY OF L.A., CAL., MUN. CODE § 12.07(A)(6) (2012).

52. DETROIT, MICH., ZONING CODE § 61-12-391 (2012); Dillon, *supra* note 29; see COLUMBIA, MO., CODE § 29-6(b) (2012).

problematic for those who see urban agriculture as an opportunity for transformation in the area of municipal green economic development. Commentators believe that it is important for members of a community to have the opportunity—both legally and financially—to be able to grow and sell food to others in the community.<sup>53</sup> The hope is that this will create both a physical space and a sense of place that encourages individuals to enhance their gardening skills and perhaps create broader “food enterprises” in the community, which could result in the sale of healthier food to more members of the community.<sup>54</sup> If an individual has a garden that is productive enough to feed themselves and wants to make money by selling surplus harvest to others, these bans stifle this form of green economic growth.<sup>55</sup>

In a twist on these ordinances, in some jurisdictions individuals are only allowed to sell the produce they grow if they obtain a CUP from the municipality, a process that is discretionary and often expensive. For example, a group of urban gardeners in San Francisco was required to apply for an expensive CUP, which—depending upon the length of the permit queue at the planning department—could have taken up to five months to receive, in order to sell their produce.<sup>56</sup> Similarly, an urban homesteader and author in Oakland, California, was recently cited for selling food without a CUP.<sup>57</sup> Many small farmers lack sufficient funds to go through such a process, especially because there is a risk that the permit might not be granted or will only

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53. See Sajid Farooq, *Oakland Sprouting New Farming Laws*, NBC BAY AREA (July 22, 2011), <http://www.nbcbayarea.com/news/local/Oakland-Looking-to-Update-Urban-Farming-Laws-125974063.html>.

54. *Id.* (quoting Aaron Lehmer, Campaigns Director for Bay Localize).

55. *But see* Emily Farris, *Kansas City Farming for Cash*, URBANFARMONLINE.COM (June 22, 2010), <http://www.urbanfarmonline.com/urban-farm-news/2010/06/22/kansas-city-urban-farming.aspx> (discussing neighbors' nuisance concerns with permitting onsite sales of produce in residential areas).

56. Zusha Elinson, *Urban Farming for Cash Gains a Toehold in San Francisco*, N.Y. TIMES (Aug. 13, 2010), <http://www.nytimes.com/2010/08/13/us/13bcfarm.html>. The application itself is also daunting. See *Application Packet for Conditional Use Authorization*, S.F. PLAN. DEP'T, <http://www.sf-planning.org/Modules/ShowDocument.aspx?documentid=481> (last visited Nov. 27, 2012).

57. City officials were alerted to Novella Carpenter's activities by animal advocates who disapproved of her selling rabbit potpies. Chip Johnson, *Novella Carpenter Could Use a Hand*, OAKLAND, SFGATE (Apr. 5, 2011, 4:00 AM), <http://www.sfgate.com/bayarea/Johnson/article/Novella-carpenter-could-use-a-hand-oakland-2376624.php>. Oakland, California, now has an interim measure in place while it undertakes a comprehensive examination of its urban agriculture policies. See *Urban Agriculture Citywide Update*, CITY OF OAKLAND, <http://www2.oaklandnet.com/Government/o/PBN/OurOrganization/PlanningZoning/OAK02.9859> (last visited Nov. 27, 2012); see also OAKLAND, CAL., ZONING CODE § 17.35.01(L7) (2011) (“Crop and Animal Raising is only permitted upon the granting of a Conditional Use Permit.”).

be granted if the applicant complies with expensive mitigation measures; thus discretionary permits often serve as a barrier to entry.<sup>58</sup> Because each jurisdiction adopts its own zoning ordinance, few urban agriculture bans are identical; however, the themes discussed in this Part are common.

### *B. Existing Bans on Backyard Chickens*

Perhaps more well-known than bans on vegetable growing and selling are bans or limitations on raising urban and suburban chickens, which have received much attention in the popular press.<sup>59</sup> The typical story is that one or more citizens want to raise chickens for eggs (or perhaps, already raise chickens for eggs), but local zoning ordinances prohibit keeping farm animals within city limits. These citizens organize, rally, and sometimes successfully overturn the existing ordinance.

Urban chicken regulations have existed for many years, in some cases preceding zoning ordinances. For example, in 1906, the New York Sanitary Code stated:

No live chickens, geese, ducks, or other fowls shall be brought into, or kept, or held, or offered for sale, or killed, in any yard, area, cellar, coop, building, premises, or part thereof, or in any public market, or on any sidewalk, street, or other place within the built-up portions of The City of New York without a permit from the Board of Health and subject to the conditions thereof.<sup>60</sup>

Similarly, in New Jersey in 1943, a woman was charged with violations of the building code for having constructed a chicken coop in her backyard.<sup>61</sup>

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58. Elinson, *supra* note 56. The San Francisco gardeners successfully challenged the ordinance requiring a CUP, with the city planner acknowledging that CUPs are “a bit of a barrier.” *Id.* (internal quotation marks omitted). The challengers wrote a letter to the zoning administrator after learning of the CUP and encouraged others to write. Subsequently, the mayor’s office introduced an ordinance, which was passed. See Brooke Budner & Caitlyn Galloway, *A Letter to the SF Planning Commission*, LITTLE CITY GARDENS (May 12, 2010), <http://www.littlecitygardens.com/2010/05/a-letter-to-the-SF-planning-commission/>; see also Brooke Budner, *Let’s Clarify SF Zoning Code!*, LITTLE CITY GARDENS (May 10, 2010), <http://www.littlecitygardens.com/2010/05/lets-clarify-SF-zoning-code/>; Caitlyn Galloway, *Success!*, LITTLE CITY GARDENS (Feb. 18, 2011), <http://www.littlecitygardens.com/2011/02/success/>.

59. See *infra* notes 66-67 and accompanying text.

60. N.Y.C., N.Y., SANITARY CODE ch. 14, § 79 (1906); see also Orbach & Sjoberg, *supra* note 24, at 19 (discussing an earlier version of this provision).

61. *Women Fight Curb on Chicken Raising*, N.Y. TIMES, Jan. 1, 1943 (“Then the borough fathers stepped in, informed Mrs. McLeod she was violating the building code,



Backyard chicken bans are now common, and there is a burgeoning literature dedicated to their existence and efforts to overturn them. For example, in a recent article Patricia Salkin summarizes regulations related to permitting chickens in residential areas,<sup>62</sup> while two other authors describe the externalities that result from citizens' objections to the overturning of chicken bans as an example of what they term the "clucking theorem."<sup>63</sup>

Like prohibitions on produce growth, bans on backyard chickens exist in many forms. Some communities ban farm animals or poultry from residential areas.<sup>64</sup> Some only permit a limited number of chickens or permit hens but ban roosters due to noise concerns.<sup>65</sup> Others require setbacks that effectively prohibit construction of any accessory structures, such as chicken coops, particularly on smaller lots.<sup>66</sup> Homeowners frequently run afoul of laws requiring a certain lot size in order to house chickens. For example, a woman in Linthicum, Maryland, had five egg-laying chickens in her backyard for over two years until a neighbor complained of smells and rats.<sup>67</sup> Because her yard was less than the acre required to keep chickens, and her coop

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enacted in 1824, and a 1927 zoning ordinance forbidding the erection of 'accessory' buildings on premises without a permit . . .').

62. See Patricia E. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, ZONING & PLAN. L. REP., Mar. 2011.

63. Orbach & Sjoberg, *supra* note 24, at 6.

64. See, e.g., AURORA, COLO., MUN. CODE §§ 14-1, 146-1203 (2012) (prohibiting livestock, which includes chickens, within the City except in agricultural zones); WHEATON, ILL., CRTY CODE §§ 14-1, -99 (2012) (prohibiting the keeping of livestock within city limits, where livestock includes chickens, unless chickens are for a 4-H project).

65. See, e.g., STAMFORD, CONN., CODE § 111-6 (2012) ("No person shall keep any rooster in such location that the crowing thereof shall be annoying to any person occupying premises in the vicinity."); PORTLAND, ME., CODE § 5-402(a)-(b) (2009) (allowing up to six female chickens per lot); ANN ARBOR, MICH., CODE tit. IX, ch. 107, § 9:42(3)(k) (2012) (permitting up to four chickens but prohibiting roosters); SEATTLE, WASH., MUN. CODE § 23.42.052(C)(2) (2012) (allowing up to eight fowl per lot but banning roosters).

66. See, e.g., NAPLES, FLA., ZONING CODE § 58-52(5) (2012) (stating that enclosures must be 30 feet from any lot line and 100 feet from neighboring residences); BATON ROUGE, LA., CODE § 14:224(c)(1)(b) (2012) (requiring coops to be 10 feet from the nearest property line and 50 feet from the nearest neighboring residence); ALEXANDRIA, VA., CODE § 5-7-2 (2012) (keeping fowl within 200 feet of any neighboring residence is unlawful); see also Salkin & Lavine, *supra* note 9, at 621-22 ("[Setbacks] bar chickens from particularly dense neighborhoods, prevent residents from keeping large flocks, and ensure that chickens have enough space to live comfortably. However, if such requirements are too restrictive, they may create obstacles to chicken raising in neighborhoods otherwise suited for that use.').

67. Tim Pratt, *County Says Coop on Linthicum Property Doesn't Meet Setback Requirements*, MARYLAND GAZETTE (Oct. 8, 2011), <http://www.mdgazette.com/content/county-linthicum-chickens-must-go>.

encroached on the fifty-foot setback, the county required her to dispose of her chickens.<sup>68</sup>

Although these bans are common, citizen outcry or interest in promoting sustainable practices has led some city councils to alter their rules. Municipalities large and small are beginning to revise these ordinances to allow residents to keep at least a few backyard chickens.<sup>69</sup> That said, a number of localities that had considered overturning existing bans have opted not to do so.<sup>70</sup> The reasons for this will be discussed *infra* Part III.

### III. JUSTIFICATIONS FOR BANS ON URBAN AGRICULTURE

Although this Article asserts that bans on urban agriculture are generally anachronistic, understanding why they are out of date requires an explanation of the reasons that they were enacted in the first instance. Those reasons are numerous and diverse, and there are legitimate bases, pursuant to a municipality's police powers, for enacting and upholding these bans. This Part will describe and evaluate some of these justifications.

#### A. *Traditional Ideals Underpinning Euclidean Zoning*

Although locavorism is now a commonplace idea, there is a sense that many land use laws are “stuck in another era,” when farming in residential areas was viewed as a harm to be avoided.<sup>71</sup> To understand why these outdated laws were enacted, and why they still exist today, it is necessary to begin with a brief bit of history. Prior to the modernization of refrigeration and food preservation technologies, communities relied on subsistence farming to feed themselves in ways that were both local and seasonal. Indeed, nearly all early residents of the Thirteen Colonies were subsistence farmers.<sup>72</sup> The federal

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68. *Id.*; see also Cory de Vera, *Willard Family Told To Get Rid of Chickens*, NEWS-LEADER.COM (July 16, 2011, 5:53 AM), <http://www.news-leader.com/article/20110716/NEWS01/107160348/Willard-family-told-get-rid-chickens> (explaining that the lot was too small).

69. See Wood et al., *supra* note 12, at 48.

70. See, e.g., Orbach & Sjoberg, *supra* note 24, at 35-36 (discussing Iowa City, Iowa, where “the 2009 campaign to legalize urban fowl failed . . . articulating concern that students may move and leave behind their chicken pets”; Franklinton, Louisiana, whose mayor said “[y]ou can’t raise animals or livestock in the city”; and Durango, Colorado, where the city worried that “chickens would threaten its modern image”).

71. Elinson, *supra* note 56.

72. See, e.g., BRUCE C. DANIELS, *THE CONNECTICUT TOWN: GROWTH AND DEVELOPMENT, 1635-1790*, at 140-41 (1979). The evolution of land in the United States is tied to the evolution of farms. Native Americans grew the country’s first subsistence gardens.

government encouraged private ownership for farming through land disposal policies,<sup>73</sup> implementing Thomas Jefferson's professed desire for a nation of "yeoman farmers" who were self-sufficient and eschewed the need for substantial governmental regulation.<sup>74</sup> Over time, small, individually owned farms were sold and combined, resulting in a transition to larger farms.<sup>75</sup> At the same time, technological advancements in farm equipment made larger farms practically and economically feasible, as well as necessary to stay competitive.<sup>76</sup> As a result of improved technologies, farmers were able

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See JOHN T. SCHLEBECKER, *WHEREBY WE THRIVE: A HISTORY OF AMERICAN FARMING, 1607-1972*, at 36 (1975). Later, colonists engaged in subsistence farming, but only after the Virginia governor ordered them to "plant a corn patch or face starvation" in 1609 because of unreliable food shipments from abroad. *Id.* ("Neither the settlers nor the capitalists expected commercial farming to become established. The promoters expected their colonists to become self-sufficient in food, but . . . [t]heir main efforts would be to obtain commodities for trade in Europe.").

73. SCHLEBECKER, *supra* note 72, at 57-65 (discussing the Homestead Act of 1862 and its predecessors). The purpose of land distribution policies "was to . . . distribute[] [land] to farmers, and the number of farmers and farms was to grow as rapidly as possible." *Id.* at 68.

74. See, e.g., THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA: QUERY XIX: MANUFACTURES* (1782), reprinted in THOMAS JEFFERSON: *SELECTED WRITINGS* 52 (Harvey C. Mansfield, Jr., ed., 1979); WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 11 (1985) (suggesting that federal "land policy was . . . deliberately designed to fulfill the Jeffersonian ideal of independent yeoman farmers"); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 *FORDHAM L. REV.* 2161, 2178 (2001) ("Jefferson disdained large-scale commerce and its effects on character; he envisioned a nation of self-sufficient yeoman farmers participating in public life to deliberate about the common good, but he was generally skeptical of all exercises of government power."); Stanley N. Katz, *Thomas Jefferson and the Right to Private Property in Revolutionary America*, 19 *J.L. & ECON.* 467, 470-74, 480-81 (1976) (discussing Jefferson's vision for the future of Virginia); James Phillips, *American Agrarianism's Answers to the Nation's (In)Securities*, 9 *CONN. PUB. INT. L.J.* 343 *passim* (2010) (discussing Jefferson's yeoman farmer ideal); Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *YALE J. ON REG.* 91, 124 (2011) ("Jefferson was convinced that the yeoman's economic self-reliance assured his freedom and political autonomy. Hence, increasing the number of American yeomen strengthened the national capacity for self-determination. Accordingly, old conservatives and old progressives both viewed the proliferation of small landholding as a bulwark of democracy.").

75. Morgan L. Holcomb, *Our Agriculture Policy Dilemma*, 8 *MINN. J.L. SCI. & TECH.* 249, 257 (2007) (reviewing MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2006)). In 1910 the average farm was 138.13 acres. SCHLEBECKER, *supra* note 72, at 207. In 1950 the average farm was 215.49 acres. *Id.* Today the average farm is 443 acres. Holcomb, *supra*, at 257.

76. Alfonso Morales & Gregg Kettles, *Healthy Food Outside: Farmers' Markets, Taco Trucks, and Sidewalk Fruit Vendors*, 26 *J. CONTEMP. HEALTH L. POL'Y* 20, 30 (2009) (discussing advances in technology, including "changes in agricultural production, refrigeration technology, and intermodal transportation" in the 1930s).

to farm larger acreages, obtain higher crop yields, and reduce their work force.<sup>77</sup>

While farms were expanding, individuals were moving closer together—by 1920, a majority of Americans lived in cities or suburbs.<sup>78</sup> Large manufacturing plants often were located next to temporary housing, making cities unsanitary and crowded.<sup>79</sup> As urban areas expanded to meet the demand for businesses and residences, there was a clash between agricultural and residential land uses.<sup>80</sup> Urban areas squeezed out gardens to make room for more profitable uses<sup>81</sup> and took over farmland, which resulted in the elimination of some farms and the pushing of others further from the city center.<sup>82</sup> This change in land use patterns meant that food had to travel further to reach city dwellers.<sup>83</sup> However, because larger farms could produce more food

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77. SCHLEBECKER, *supra* note 72, at 30, 145. For example, “[p]rior to mechanization, it took three hours and forty minutes for a farmer to harvest one bushel of wheat; by the 1880s the farmer’s grandson needed only ten minutes to produce the same bushel.” Robert C. Welch, *From Manpower to Horsepower: Technological Change in the Nineteenth Century*, IOWA ST. U. CTR. FOR AGRIC. HIST. & RURAL STUDS., <http://www.history.iastate.edu/agprimer/Page23.html> (last visited Nov. 27, 2012).

78. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 16 (1999); Shoked, *supra* note 74, at 128 (“By the end of the 1920s, nearly a third of the metropolitan population lived outside the central city.”).

79. MUMFORD, *supra* note 11, at 431-34; *see also* Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 157 (2006) (“Plagued by adult crime, juvenile gangs, and inadequate law enforcement, Denver was a rough and dirty city in the late nineteenth century. Heatless tent slums rife with disease sprawled on the banks of the Platte River, into which raw sewage drained until the mid-1880s. Citizens raised chickens and dairy cows on their urban property . . .”).

80. “[F]ewer urban dwellers ha[d] any farm background, they [were] less tolerant of the smells, noise, dust and other inconveniences that result from farm operations.” H.W. Hannah, *Farming in the Face of Progress*, 11 PROB. & PROP. 9, 9 (1997); *see, e.g.*, *Twigg v. County of Will*, 627 N.E.2d 742, 744 (Ill. App. Ct. 1994) (relating testimony that “agricultural use was incompatible with residential development to the extent that mail boxes and garbage cans along the roadways might hinder the movement of farm machinery, or children playing in the area might damage terraces and downspouts”).

81. MUMFORD, *supra* note 11, at 428, 434 (reasoning that the demand for “pecuniary exploitation . . . reduced the rear garden to a backyard for drying clothes [as residences were built] back to back” and as people paved “[t]he court between the buildings . . . prohibit[ing] even the most pinched garden”).

82. *See, e.g.*, Thomas Benton Bare III, *Recharacterizing the Debate: A Critique of Environmental Democracy and an Alternative Approach to the Urban Sprawl Dilemma*, 21 VA. ENVTL. L.J. 455, 455-56 (2003); Hannah, *supra* note 80, at 9; Tamara Mullen, Note, *The McMansion: Architecture’s Role in Facilitating Urban Sprawl and Farmland Loss*, 12 DRAKE J. AGRIC. L. 255, 257-59 (2007). This pattern of development continues today. *Id.* at 256 (“[L]and masses the size of Delaware are paved over every year to make way for expanding hypersprawl.”).

83. Pothukuchi & Kaufman, *supra* note 26, at 215 (“As local farms disappeared, food simply came from more distant places, and from farms that were more intensively cultivated by increasingly corporate players.”).

more quickly, and because supermarkets were available and sold many products, individuals were relieved of pressure to produce their own food.<sup>84</sup> As a result, residential landscapes changed as yards replaced gardens.<sup>85</sup>

Neighbors and courts discovered that the traditional common law tools that had been used to constrain land use—nuisance and restrictive covenants—were no longer effectively protecting the new suburban “utopia”<sup>86</sup> and the sanctity of its homes, most of which were inhabited by the middle and upper classes.<sup>87</sup> Nuisance law, a judicial land use control, provided a cause of action against a person who substantially interfered with the use and enjoyment of another’s land by engaging in activities that were negligent, reckless and unintentional, or intentional and unreasonable.<sup>88</sup> In the land use context, individuals typically brought nuisance suits for intentional actions.<sup>89</sup> Courts used different tests to determine what actions were unreasonable.<sup>90</sup> Nuisance suits are still used today, but the consensus is that they are more successful when used to control small, localized harms; the conflict between agriculture and residential uses proved to need a larger-scale solution.<sup>91</sup> From a private contract law perspective,

84. Between 1934 and 1938 the amount of available frozen foods increased from 10 million pounds to 250 million pounds. SCHLEBECKER, *supra* note 72, at 231. The modern supermarket originated in the 1920s. *Id.* at 232. By 1969, supermarkets accounted for 52.4% of the food-retailing business. *Id.* at 293; MARION NESTLE, WHAT TO EAT 17 (2006).

85. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 54 (1985) (“Between 1825 and 1875, middle-class Americans adopted a less utilitarian expectation about residential space. They no longer needed herbs and vegetables from gardens, and . . . a smooth lawn replaced the rough meadow cut by scythe or sheep.”).

86. MUMFORD, *supra* note 11, at 428, 486.

87. *Id.* at 493, 495 (“[T]he suburb . . . tended to remain a one-class community, with just a sufficient fringe of tradesmen and servants to keep it going—the latter often condemned to use the central metropolis as their dormitory.”).

88. JESSE DUKEMINIER ET AL., PROPERTY 641-42 (6th ed. 2006).

89. *Id.* at 642-43. For an action to be intentional, the actor needed only realize that their action was likely to cause the result—they did not need to act for the purpose of causing it. *Id.* at 642.

90. Some courts determined that if a harm passed a given threshold, it was unreasonable. See *Jost v. Dairyland Power Coop.*, 172 N.W.2d 647, 651 (Wis. 1969). Others applied a utilitarian test to determine whether the gravity of the harm outweighed the benefit of the actor’s conduct. The Restatement (Second) of Torts adopts this view. RESTATEMENT (SECOND) OF TORTS § 826(1) (1989).

91. See, e.g., DUKEMINIER ET AL., *supra* note 88, at 665 (“[N]uisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.”); FISCHER, *supra* note 74, at 27 (attributing this trend to “the lack of prospective control, the high cost of litigation, and the tendency to use the extreme remedy of the injunction rather than award damages”); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 775-76 (2001) (“As a remedy particularly well suited for ‘localized’ problems, it has ‘contributed consistently to the

individuals also bound themselves to use or not use their land in certain ways via real covenants that ran with the land.<sup>92</sup> These covenants are still quite common today in the form of covenants, conditions, and restrictions (CC&Rs), which are recorded documents that control the use of property in many residential subdivisions.<sup>93</sup>

Although these common law controls were sufficient for a time, states and municipalities began to consider regulatory approaches to controlling land use as technology advanced; industrial uses grew louder, noisier, and dirtier; automobiles developed; cities grew more crowded; and people began to spread out.<sup>94</sup> States adopted zoning enabling acts that empowered localities to implement land use regulations “[f]or the purpose of promoting health, safety, morals, or the general welfare of the community.”<sup>95</sup> Pursuant to this authority, municipalities began to enact zoning ordinances to regulate aspects of city life,<sup>96</sup> such as the height and bulk of buildings, the size of yards, and most importantly, the use of buildings and land.<sup>97</sup> Further, as more

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just resolution of neighborhood environmental conflict.” (quoting 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 2.1, at 33 (1986))). Indeed, “[n]uisance law has largely been superseded by zoning and other police power controls.” Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973) (“Many land use activities now constrained by zoning ordinances raise only localized threats [as opposed to pervasive threats] that would be better handled through private nuisance remedies . . .”).

92. DUKEMINIER ET AL., *supra* note 88, at 740.

93. See, e.g., *Covenants, Conditions and Restrictions*, CAMERON PARK CMTY. SERVS. DIST., <http://cameronpark.org/ccrs.html> (last visited Nov. 27, 2012); *Covenants, Conditions, and Restrictions Applicable to Vineyard Estates*, VINEYARD ESTATES (Jan. 2007), [http://www.vineyardestatesberea.com/pdfs/deed\\_restrictions.pdf](http://www.vineyardestatesberea.com/pdfs/deed_restrictions.pdf); *Declaration of Covenants, Conditions and Restrictions for Alary Farm Subdivision*, ALARY FARM (2001), <http://www.alaryfarm.com/alacovee.pdf>.

94. See S.J. MAKIELSKI, JR., THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE 62-70 (1966) (discussing the evolution of zoning in New York from 1916 to 1960).

95. U.S. DEP’T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 1 (1926) (footnotes omitted).

96. New York City is often credited with creating one of the first comprehensive zoning ordinances. See MAKIELSKI, *supra* note 94 (discussing the evolution of zoning in New York from 1916 to 1960). During the early 1900s, New York developers constructed skyscrapers that cut off the light and air that residential neighbors desired. At the same time, fancy retail stores on Fifth Avenue disliked the influx of immigrants who worked at the new garment factories in their neighborhoods. Thus a coalition of forces banded together to petition for a comprehensive regulatory scheme to control who and what could be located where. See *id.* at 62-70; Basiouny, *supra* note 2.

97. Many early ordinances included a zone that allowed little more than single-family residential homes (even apartments were prohibited). See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380 (1926) (upholding an ordinance categorizing land uses into a hierarchy of zones, where the most restrictive permitted only “single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck

states moved toward home rule through state constitutional amendments and statutes,<sup>98</sup> their municipalities were freed from strict adherence to the provisions of their enabling acts.<sup>99</sup>

As zoning flourished, some questioned its constitutionality. In 1926, the United States Supreme Court considered the question in *Village of Euclid v. Ambler Realty Co.* and determined that comprehensive zoning was constitutional.<sup>100</sup> The divide between urban and suburban, and rural and agricultural, lands as we know them today traces its origin to the type of zoning that the *Euclid* Court upheld, now known as Euclidean zoning.<sup>101</sup> The idea behind Euclidean zoning is that uses that are thought to be incompatible should be kept separate from one another.<sup>102</sup> This was especially true for industrial uses, which were to be separated from residential uses for fear that they would likely cause nuisances if they were located nearby. Specifically, the Court viewed single-family homes as the highest and best use of property,<sup>103</sup> and thus those structures were to be separated from every other use.<sup>104</sup> Under the aegis of promoting the health, safety, welfare, and morals of the community, municipalities zoned out the less-civilized, potentially nuisance-causing uses, including agriculture.<sup>105</sup> This line of reasoning explains why both gardening and keeping farm

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gardening” and forbade two-family dwellings, apartments, municipal buildings, and commercial and industrial uses).

98. Home rule municipalities have broad, general powers. ELLICKSON & BEEN, *supra* note 20, at 29-30.

99. See, e.g., *White v. City of Dallas*, 517 S.W.2d 344, 347 (Tex. Civ. App. 1974) (determining that a home rule city was able to zone more broadly than the text of the enabling act would suggest).

100. 272 U.S. at 397.

101. “In 1840 suburbs had not yet developed into a recognizable entity, distinct from either the city or the farm.” JACKSON, *supra* note 85, at 45.

102. See Shoked, *supra* note 74, at 95, 99-100 (describing property ownership in “post-Euclid America” as signifying “security rather than freedom” and property rights as protecting “tranquil security” rather than “dynamic development”).

103. *Village of Euclid*, 272 U.S. at 394 (referring to apartments as “mere parasite[s]”).

104. See Salkin, *supra* note 2, at 110 (“[Z]oning was viewed as a means to an end—the end being to separate incompatible land uses because there was an inherent conflict between uses that were not identical (e.g., residential, agricultural, business and commercial). . . . [T]he historical use of zoning [was] merely a tool to separate what had been viewed as incompatible land uses.” (footnote omitted)).

105. *Village of Euclid*, 272 U.S. at 394 (describing apartments as “parasite[s]”); see also Rachel Medina & A. Dan Tarlock, *Addressing Climate Change at the State and Local Level: Using Land Use Controls To Reduce Automobile Emissions*, 2 SUSTAINABILITY 1742, 1745 (2010) (“[Euclid] thus enshrined the low-density, single-family house, protected from alien, lower land uses such as apartments, as the highest form of civilized land-use.”).

animals are prohibited in many localities that hew to traditional Euclidean zoning.<sup>106</sup>

In addition to validating zoning, *Euclid* arguably also ushered in a new conception of property rights; in exchange for the security that one's neighborhood environment (and thus property value) would be preserved, one gave up much of the freedom to use and develop their property.<sup>107</sup> Thus *Euclid* not only affected a home's surroundings—by establishing what could and could not be developed next to the home—but it also modified the “sticks” in the homeowner's “bundle” of rights by reigning in much of the flexibility that the homeowner previously had to use their land as they pleased.<sup>108</sup>

The values, ideas, and assumptions that are embodied in Euclidean zoning ordinances are founded in traditional concepts of the police powers: protection of children, upper- and middle-class families, property values, the sanctity and quiet of the suburbs, and a very specific sense of place.<sup>109</sup> In 1974, the Supreme Court famously explained in *Village of Belle Terre v. Boraas*:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>110</sup>

Thus restrictions developed not just because of the perception that agricultural uses caused specific harms but also because of a cultural sense that agricultural (and industrial) use was not socially appropriate in the vicinity of homes and families. These values still serve as a justification for many bans that prohibit urban agriculture in residential areas.

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106. Once a municipality was zoned and “the impurities of agriculture [were] removed, a new settlement was born, one that commanded cleaner landscaping: well manicured, sterile varieties of trees, shrubs, and ground covers.” NORDAHL, *supra* note 16, at 3.

107. Shoked, *supra* note 74, at 99-100. But cf. Keith H. Hirokawa, *Property Pieces in Compensation Statutes: Law's Eulogy for Oregon's Measure 37*, 38 ENVTL. L. 1111, 1144 (2008) (“[I]t is arguable that these changes [in the right to use property due to zoning] did not affect the substance or character of the property right: zoning did not alter the basis for the nuisance limitation on the property right . . . . The only change of substance was in the manner and forum in which the determination was made.”).

108. Conversely, zoning also created value by restraining neighbor A's ability to impact neighbor B's property.

109. *Village of Euclid*, 272 U.S. 365.

110. 416 U.S. 1, 9 (1974).



Often, municipalities that ban front yard gardens and backyard chickens seek to appeal to a certain type of potential resident—one who seeks a community that embodies Euclidean ideals of family and traditional values.<sup>111</sup> The idea that different localities are designed for, and thus appeal to, different types of people ties into the theory set forth by Charles Tiebout in his seminal article, *A Pure Theory of Local Expenditures*.<sup>112</sup> There, Tiebout views people not as residents or members of local governments—*cum*—democratic polities, but rather as “consumer-voters” who express their preferences by seeking out municipalities that provide the public goods and services that appeal most to them.<sup>113</sup> Thus it makes sense that different communities would have different rules and provide different services so as to appeal to and attract different “consumers.” And some communities will likely continue to hold to traditional Euclidean values so as to attract residents who hold those values.

### *B. Promoting Public Health and Avoiding Nuisances*

Another reason that municipalities enact bans on urban agriculture is the protection of public health and the prevention of nuisance claims, pursuant to the municipalities’ police powers.<sup>114</sup> States are presumed to have inherent, plenary authority to regulate, subject to the limits of the Federal Constitution and the states’ constitutions. Traditionally, local governments are viewed as creatures of the state and derive their powers from the state.<sup>115</sup> This is consistent

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111. See DAVID TRACEY, URBAN AGRICULTURE: IDEAS AND DESIGNS FOR THE NEW FOOD REVOLUTION 1-5 (2011) (describing an instance of vehement community backlash against a community garden).

112. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 420 (1956).

113. *Id.* at 417.

114. See, e.g., *Phillips v. Town of Oak Grove*, 968 S.W.2d 600, 603 (Ark. 1998) (“Oak Grove is legislating under its police power when it states that its purpose is to protect the residents of the town from the deleterious effects of commercial broiler activities, to protect against offensive or noxious odors, and to protect the order, peace, comfort, convenience, safety, general welfare, health and prevent injury from offensive or unhealthy matters.”); *Becker v. Arnfeld*, 466 P.2d 479, 480 (Colo. 1970) (“The clear intent expressed in the covenants as a whole is to create a desirable, pleasant residential area.”); HELGA OLKOWSKI ET AL., *THE INTEGRAL URBAN HOUSE: SELF RELIANT LIVING IN THE CITY* 252 (2008) (“Most municipal ordinances restricting livestock were made to protect urbanites from the smell, noise, flies, and general nuisance-causing behavior associated with farm animals in the city . . .”).

115. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (stating that localities are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them”), *overruled on other grounds by* *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

with John Dillon's rule, which suggests that all local power must be expressly granted.<sup>116</sup> However, most states now allow home rule by municipalities, which empowers local governments to regulate without seeking express authorization from the state.<sup>117</sup> Localities generally have the power to pass regulations and act in the interest of public health, safety, and welfare unless the state expressly retains that power.<sup>118</sup> These police powers have been interpreted broadly;<sup>119</sup> a court recognizing the breadth of the power to regulate observed, "[t]he promotion of the general welfare does not rigidly limit governmental authority to a policy that would 'scorn the rose and leave the cabbage triumphant.'"<sup>120</sup> (However, it could!)<sup>121</sup> Although many municipalities

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116. Localities "possess[] and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; [and] third, those essential to the accomplishment of the declared objects and purposes of the corporation." 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 449 (5th ed. 1911) (emphasis omitted); see, e.g., *TransDulles Ctr., Inc. v. USX Corp.*, 976 F.2d 219, 224 (4th Cir. 1992). All states have adopted enabling legislation that expressly grants zoning powers to municipalities. See ELLICKSON & BEEN, *supra* note 20, at 29.

117. See DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 14 (2001).

118. See, e.g., James G. Hodge, Jr., *An Enhanced Approach to Distinguishing Public Health Practice and Human Subjects Research*, 33 J.L. MED. & ETHICS 125, 130 (2005) ("Primary responsibility for protecting the public's health, however, is held by the states (and local governments via delegated state authority)."); Catherine J. LaCroix, *SEPA's, Climate Change, and Corporate Responsibility: The Contribution of Local Government*, 58 CASE W. RES. L. REV. 1289, 1295 (2008) ("[L]ocal governments have land use regulatory power and power to adopt local environmental regulations, both through state legislation authorizing zoning, comprehensive planning, or other regulation, and through home rule power."); Anthony J. Samson, Comment, *A Proposal To Implement Mandatory Training Requirements for Home Rule Zoning Officials*, 2008 MICH. ST. L. REV. 879, 886 ("Absent expressed or implied powers to regulate a particular activity, home rule municipalities may rely on their police powers to safeguard and promote public health, safety, morals, and general welfare." (footnote omitted)).

119. They "justify virtually any exercise of . . . local government to preserve, protect, or promote the public's health that does not infringe [upon] constitutionally-protected individual or community rights." Hodge, *supra* note 118, at 130; see *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive."); Judith A. Stoll, Comment, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 BROOK. L. REV. 259, 295 n.191 (1983) ("[T]he term 'police powers' is broad enough to encompass all the powers by which local government is authorized to protect public welfare [and] may be applied to regulate activities which may or may not be 'integral' or 'governmental' insofar as those activities affect public health and safety.").

120. *Buhler v. Stone*, 533 P.2d 292, 294 (Utah 1975) ("[General welfare considerations include] the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and [preservation of] the beauty as well as the usefulness of the environment.").

121. Although a municipality could adopt a policy banning flowers and requiring vegetables, it would be subject to the limits of democracy: voters would likely make this result impossible or impermanent.

do not think of food as an urban or local issue,<sup>122</sup> localities are in a fine position to regulate many food issues and may do so pursuant to their police powers.<sup>123</sup>

Further, as discussed earlier, private nuisance law protects an individual from substantial interference with the use and enjoyment of their property when another is acting intentionally and unreasonably.<sup>124</sup> Thus, a locality might not want to allow intensive urban gardening due to fears that the fresh, and subsequently rotting, fruit and vegetables will attract pests. A compost pile, for example, if located too close to a neighbor's home, may smell and attract flies or rats.<sup>125</sup>

Locavores who wish to raise chickens are harmed by bans that prevent them from doing so. However, that harm must be balanced against the harm that their neighbors would suffer as a result of the locavores' chickens, including potential health concerns and loud

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122. "When people think of urban policy, . . . food issues are hardly given a second thought." Pothukuchi & Kaufman, *supra* note 26, at 216-17. Perhaps this is because most U.S. food policy is dictated at the federal level. See, e.g., Food, Conservation, and Energy Act of 2008, H.R. 6124, 110th Cong. (2008); see also MARTINEZ ET AL., *supra* note 15, at 35-39; David Burnett, Note, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 373 (2007) ("Congress influences the food that Americans eat with food subsidies, food-safety laws, nutritional standards, and regulations governing the ingredients, packaging, marketing, and sale of food intended for public consumption."); A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crises in the United States*, 64 FOOD & DRUG L.J. 405 (2009) (discussing food security as a national issue); Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 FOOD & DRUG L.J. 371 (2002) (discussing nutrition policy as a national issue).

123. Food policy has dramatic impacts on localities, as it affects "the local economy, the environment, public health, and quality of neighborhoods." Pothukuchi & Kaufman, *supra* note 26, at 216-17 (emphasis omitted); see NORDAHL, *supra* note 16, at 53 ("Programs, policies, funding strategies, and maintenance regimens of any urban agriculture endeavor will be difficult to implement and sustain if the largest land-owner in the city [the municipal government] is indifferent."). However, some commentators assert that the state should play a key role in food policy. See, e.g., Smita Narula, Comment, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE HUM. RTS. & DEV. L.J. 403, 407 (2010) ("[S]tates occupy a central and critical role in ensuring the right to food . . ."); Salkin & Lavine, *supra* note 9, at 600 ("[M]eaningful change in regional food system policies is likely to start with state and local governments [because] community based food systems have the potential to 'simultaneously address issues of food security, public health, social justice, and ecological health in local communities and regions . . .'" (quoting KIMBERLY HODGSON ET AL., AM. PLANNING ASS'N, URBAN AGRICULTURE: GROWING HEALTHY, SUSTAINABLE PLACES 4 (2011) (footnote omitted))).

124. *Supra* notes 89-90 and accompanying text.

125. *Composting*, ACE HARDWARE, <http://www.acehardware.com/info/index.jsp?categoryId=1283900> (last visited Nov. 27, 2012) ("Some people have concerns about compost heaps fearing they will attract insects, rodents and other pests as well as produce undesirable odors. Most of these worries are unfounded, especially with a properly maintained pile.").

noise.<sup>126</sup> Many chicken ordinances allow a limited number of hens within city limits, but ban even a single rooster due to the noise roosters create at sunrise each morning.<sup>127</sup> Localities may also ban roosters because they can be used in cockfighting, which is illegal in every state yet is still a problem faced by local law enforcement officers.<sup>128</sup>

Even bans on female chickens are often founded in nuisance reasoning because chickens can attract pests and predators and may smell if they are not cleaned up after regularly.<sup>129</sup> Courts that have considered chicken bans that are founded on harm prevention, noxious use, or nuisance rationales have found those bans to be constitutional because they do not interfere with any fundamental rights.<sup>130</sup>

There are also some legitimate environmental and health concerns associated with urban agriculture. If a city does not ban fertilizers or insecticides, those products can make their way into the local water supply.<sup>131</sup> Similarly, if not properly disposed of, animal

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126. Orbach & Sjoberg, *supra* note 24, at 14 (discussing externalities surrounding backyard chicken debates).

127. See Wood et al., *supra* note 12, at 45 (discussing noise-based rooster bans). However, at least one court found that the morning crowing of a rooster was “a symbol of ‘good cheer and happiness.’” Salkin, *supra* note 62, at 4 (quoting Myer v. Minard, 21 So. 2d 72, 76 (La. App. 2 Cir. 1945)).

128. See, e.g., *Cockfighting Raid Results in 145 Arrests*, WRAL.COM (Jan. 22, 2007), <http://www.wral.com/news/local/story/1175339/>; Howard Portnoy, *Leader of FL Cockfighting Ring Pleads Guilty; Faces Jail Time*, EXAMINER.COM (Oct. 21, 2011), <http://www.examiner.com/pet-news-in-national/leader-of-fl-cockfighting-ring-pleads-guilty-faces-jail-time>; Alexis Shaw, *Drug Raid Leads to Cockfighting Ring Discovery*, NBC S. CAL. (Oct. 14, 2011), <http://www.nbclosangeles.com/news/local/Drug-Raid-Leads-to-Cockfighting--131816783.html>.

129. See, e.g., HOMEWOOD, ALA., CODE § 4-8 (2008) (“It shall be unlawful for any person to keep, harbor, or possess any chicken, . . . except . . . [u]nder circumstances where no noise, odor, or pollution violation or nuisance is occasioned thereby”), *quoted in* Salkin, *supra* note 62, at 4.

130. See, e.g., Phillips v. Town of Oak Grove, 968 S.W.2d 600, 608 (Ark. 1998) (“[T]he town of Oak Grove acted within its lawful discretion in prohibiting the keeping of swine or fowl for commercial purposes within the town limits.”); City of St. Paul v. Nelson, 404 N.W.2d 890, 891-92 (Minn. Ct. App. 1987) (upholding the constitutionality of ordinance prohibiting keeping of chickens that cause a nuisance, and finding that “numerous complaints of a rooster’s frequent crowing at inconvenient hours demonstrate a nuisance”); *cf.* City of Springdale v. Chandler, 257 S.W.2d 934, 935 (Ark. 1953) (“It might be arbitrary to prevent the keeping of a few hens at a place where it would not be arbitrary or unjust to prevent the keeping of thousands of chickens.”).

131. William K. Reilly, *The Future of Environmental Law*, 6 YALE J. ON REG. 351, 353 (1989) (“There are literally millions of small, decentralized sources of pollution along the coast itself and millions more located well inland. Lawn fertilizers and backyard garden insecticides used in Brattleboro, Vermont end up contributing pollution to Long Island Sound.”). Pesticide loads in residential areas are often higher per acre than loading from agricultural areas. Jim Criswell et al., *Pesticides in Residential Areas—Protecting the*

waste can also be a source of water pollution and can contaminate municipal water supplies with *E. coli*.<sup>132</sup> In some urban areas, the soil is contaminated with lead or other substances that would make it an unhealthy base in which to plant edible foods.<sup>133</sup> Finally, sometimes maintenance and safety justify bans, especially of fruit-bearing trees that overhang public ways. The concern is that the nuts or fruit will fall, the ground will become slippery and dirty (causing accidents), and pests will be attracted to the smell.<sup>134</sup>

### C. Aesthetic, Economic, and Exclusionary Justifications

Some urban agriculture bans are in place for aesthetic reasons.<sup>135</sup> Indeed, localities can regulate to prohibit vegetable gardens and

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*Environment*, DIV. OF AGRIC. SCI. & NAT. RES., OKLA. ST. U., at 7461-1, <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-2341/PSS-7461web.pdf> (last visited Nov. 27, 2012) (“In residential areas, chemicals are applied to smaller areas, but applications may be heavier and more frequent [than in agricultural areas].”).

132. John E. Mogk et al., *Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties in the City of Detroit: Benefits, Problems and Proposals for a Regulatory Framework for Successful Land Use Integration*, 56 WAYNE L. REV. 1521, 1538 (2010) (“[U]ntreated manure can be carried away by rainwater into feedlots, pastures and water sources for human or animal consumption.”).

133. For example, in Portland, Maine, industrial uses, gasoline, and lead paint resulted in lead filtering into much of the soil in the downtown residential area, requiring those who wish to plant edible foods to use raised beds. John Richardson, *Dirt Alert: Test for Lead, Vegetable Gardeners*, PORTLAND PRESS HERALD (Mar. 12, 2010), [http://www.pressherald.com/archive/dirt-alert-test-for-lead-vegetable-gardeners\\_2009-03-13.html](http://www.pressherald.com/archive/dirt-alert-test-for-lead-vegetable-gardeners_2009-03-13.html). Other urban areas are built on the sites of former industrial plants and struggle with lead contamination. Mogk et al., *supra* note 132, at 1535-38 (noting that areas of Detroit, New York, Baltimore, Boston, Chicago, Los Angeles, Minneapolis, and Philadelphia have high levels of lead due to former industrial uses).

134. “[M]any municipalities have . . . bans on planting of fruit and nut trees on public streets, and sometimes local zoning prohibits small agricultural practices downtown. However, the justifications of maintenance and aesthetics for not allowing food-bearing plants in public spaces may be misconceptions . . .” Jason J. Czarnecki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263, 274 (2011) (footnotes omitted). Despite its extensive urban agriculture planning, Seattle, Washington, bans fruit trees in the public right of way. *Growing Food in Planting Strips*, SEATTLE.GOV, <http://www.seattle.gov/util/environmentconservation/mylawnlawn/garden/foodgardening/plantingstrips/> (last visited Nov. 27, 2012).

135. NORDAHL, *supra* note 16, at 91 (“The biggest objections to planting food-bearing plants in public spaces have always been, and will likely continue to be, maintenance and aesthetics.”); Kate A. Voigt, Note, *Pigs in the Backyard or the Barnyard: Removing Zoning Impediments to Urban Agriculture*, 38 B.C. ENVTL. AFF. L. REV. 537, 565 (2011) (noting that aesthetics are one reason for opposition to urban agriculture). *But see* Alexandra Dupalito Dunn, *Siting Green Infrastructure: Legal and Policy Solutions To Alleviate Urban Poverty and Promote Healthy Communities*, 37 B.C. ENVTL. AFF. L. REV. 41, 47 (2010) (“Green infrastructure also benefits the urban poor by enhancing the aesthetic appeal of communities with trees and vegetation.”); Mogk et al., *supra* note 132, at 1567 (arguing that urban agriculture can enhance aesthetics in blighted cities).

chickens on purely aesthetic grounds because aesthetics fall within a municipality's police power.<sup>136</sup> Many communities and residents prefer uniform, neat front yards to overgrown, messy vegetable gardens and chicken coops, and they feel that gardens and chickens are out of place in their upper- or upper-middle-class communities.<sup>137</sup>

Beyond pure aesthetics, studies suggest that the appearance of homes in a neighborhood affects property values in that neighborhood.<sup>138</sup> Thus, though the bans might be couched in aesthetics,<sup>139</sup> perhaps the underlying reason for excluding gardens and chickens is that communities do not want their property values negatively impacted.<sup>140</sup> William Fischel's "homevoter hypothesis" supports this contention; he suggests that homeowners make self-interested decisions about local politics and regulation to preserve their homes' values.<sup>141</sup> Zoning ordinances are thus often used as exclusionary devices.<sup>142</sup> Exclusion is typically demonstrated through large-lot zoning—for example, an ordinance might require lots to be at least one acre and house only a single-family home—which effectively closes the market to those who cannot afford a large parcel of land or the cost to heat a large house. However, exclusionary justifications

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136. *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The values [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . .").

137. *Supra* notes 37-41 and accompanying text.

138. *See, e.g.,* Susan D. Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market*, in *THE CULTURAL MEANING OF URBAN SPACE* 139, 140 (Robert Rotenberg & Gary McDonogh eds., 1993) (noting that vacant properties lower the value of nearby homes, even if those homes are in good condition); Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 *REAL EST. ECON.* 241, 243 (2008) (noting that community gardens positively impact the sales prices of nearby properties and that "gardens have the greatest impact in the most disadvantaged neighborhoods").

139. If these bans were not in place, aesthetics could not be the sole basis of lawsuits by neighbors seeking removal of front yard gardens or chickens; the "aesthetic nuisance" doctrine protects people from suing for a nuisance on purely aesthetic grounds. Smith, *supra* note 39, at 215 ("[T]here are certain activities that are privileged and not subject to nuisance balancing. One such range of activities is embraced by the doctrine of aesthetic nuisance. . . . [T]he actor has immunity if an aesthetically offended observer brings an action for nuisance.").

140. *See, e.g.,* Salkin, *supra* note 62, at 1 ("People who criticize efforts to allow chickens in neighborhoods worry that property values will plummet, that chickens will create foul odors and noise, and that they will attract coyotes, foxes, and other pests." (footnote omitted)).

141. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 4-6, 12 (2001), *quoted in* ELLICKSON & BEEN, *supra* note 20, at 46-47.

142. ELLICKSON & BEEN, *supra* note 20, at 768-71.

might also exist for urban agriculture bans.<sup>143</sup> Although it is now fashionable in some circles to keep chickens in the backyard or plant a large vegetable garden in the front, these practices were historically identified with low-income families and recent immigrants.<sup>144</sup> These were perhaps also the people who needed to grow their own food for subsistence because they were unable to afford to purchase it, unlike their wealthier counterparts who shopped at the grocery store. Thus, by banning chickens or the growing of produce in residential areas, the local legislatures and their constituents could ensure that the types of people who would need to engage in those behaviors would be kept out. At the same time, this also would have the benefit of preserving property values and maintaining a neat, uniform aesthetic.

#### *D. Inertia and Neighbor Complaints*

Political inertia is one of the least justifiable explanations for bans on urban agriculture but also one of the easiest to explain. Because many of these bans have existed for decades, few residents have even considered the possibility of an urban or suburban landscape featuring farm animals and produce.<sup>145</sup> Further, inertia is evident in the low priority that enforcement of these violations receives. In many instances, although code enforcement officers have the authority to issue citations, they rarely do so unless there is a complaint from a neighbor.<sup>146</sup> Local newspaper articles are rife with examples of this

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143. See, e.g., STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 190 (2011) ("From the beginning, zoning was as much about excluding undesirable people as about excluding undesirable uses of land."); Elizabeth Ryan, *Signal Mountain Suburbanite Lobbies Council for Right To Raise Chickens*, TIMESFREEPRESS.COM (Jan 10, 2009), <http://timesfreepress.com/news/2009/jan/10/signal-mountain-suburbanite-lobbies-council-right/> (reporting that the city council revised zoning code pursuant to complaints that "Hispanic immigrants [were] keeping chickens, rabbits and other animals in their backyards").

144. See GILDA L. OCHOA, *BECOMING NEIGHBORS IN A MEXICAN AMERICAN COMMUNITY: POWER, CONFLICT, AND SOLIDARITY* 114 (2004).

145. See, e.g., ARKADDELPHIA, ARK., CODE § 4-4 (1969) ("It shall be unlawful for any person to keep or to allow to run at large within the city any chickens, ducks, geese, turkeys or any other kind of domestic fowl . . ."); DENVER, COLO., REV. MUN. CODE § 8-91 to -93 (2012) (prohibiting backyard chickens without a permit); see also Orbach & Sjoberg, *supra* note 24, at 35-36 (discussing the desire of residents of Franklinton, Louisiana, to eliminate their "outdated" ordinance banning chickens).

146. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker theorizes that the amount of damage caused by the offense "determines the amount and type of resources and punishments used to enforce a piece of legislation." *Id.* at 169. Offenses that "do more damage" are more likely to be discovered and punished. *Id.* at 186.

very situation.<sup>147</sup> For example, a Delaware woman who had chickens for over three years and regularly shared their eggs with her neighbors only learned of the illegality when a neighbor reported her rooster's loud crowing.<sup>148</sup> Similarly, in Sacramento, California, a woman was cited when a neighbor reported her to code enforcement authorities for planting tomatoes and a fruit tree on her front lawn.<sup>149</sup>

There are two ways to interpret this anecdotal data. The first is that code enforcement officers, though concerned about violations, are too busy to patrol neighborhoods.<sup>150</sup> Therefore, they rely on neighbors to enforce the provisions for them. The other interpretation is that code enforcement officers, and city officials generally, have other priorities, but because the bans exist, they must react in response to a valid complaint. This second approach suggests that the laws are outdated and are ripe for revision.<sup>151</sup> Both of these interpretations are different from the criminal law concept of desuetude, which suggests that if a law has not been enforced for a long period of time, it no longer has any effect.<sup>152</sup> Here, the laws are still being enforced but typically only when their violation is expressly brought to the attention of the code compliance division by a disgruntled neighbor. This raises a problem: When a person lives in a community that bans chickens or front yard gardens, but the community knows that those ordinances are not enforced, and most people who have chickens or gardens have never had a problem, there is little incentive to change those ordinances.<sup>153</sup> Some municipalities also likely keep bans in place because they fear that expressly allowing urban agriculture is passing a new law to appeal to a small group of people who want to undertake a

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147. A Google search for "neighbors cry fowl" brings up numerous articles describing neighbors complaining about chickens, ducks, and even peacocks in their neighborhoods.

148. Basiouny, *supra* note 2.

149. City authorities "then notified Baumann that she would have to pull up the plants or face a \$750 fine." Cary, *supra* note 41.

150. See Wood et al., *supra* note 12, at 4 (describing this approach as "a 'living code,' a complainant-driven system").

151. See Mukherji & Morales, *supra* note 17, at 2 ("Frequently, these policy barriers are unintentional."); Wood et al., *supra* note 12, at 51 ("It is widely known that many people keeping chickens in Eugene [Oregon] are in violation of the limits, indicating a regulatory change is necessary.").

152. BLACK'S LAW DICTIONARY 513 (9th ed. 2009); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1347 (2008) ("[T]he current widespread disobedience of a statute does not make it desuetudinal. Instead, a longstanding government policy of non-enforcement drives desuetude." (footnote omitted)).

153. See Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 311 (2010).



specific activity, which sets a bad precedent and might open the floodgates to similar requests by other small groups.<sup>154</sup>

#### IV. JUSTIFICATIONS FOR REMOVAL OF PROSCRIPTIVE URBAN AGRICULTURE BANS AND REPLACEMENT WITH PRESCRIPTIVE OR PERMISSIVE URBAN AGRICULTURE POLICIES

There is validity behind some of the reasons that municipalities have instituted, and have kept in place, bans on urban agriculture and urban homesteading. However, those bans are grounded in an insufficiently nuanced view of the range of modern agricultural practices and an outdated set of property and land use legal theories. Further, the values that undergirded those restrictive ordinances are beginning to change as communities look to the future and enact policies for sustainable development.

On judicial review, revisions to a zoning ordinance are often viewed as legislative actions taken by the local elected legislative body<sup>155</sup> and will be upheld if they are “fairly debatable.”<sup>156</sup> If they are unreasonable, or arbitrary and capricious, the court will substitute its judgment for that of the local officials.<sup>157</sup> This Part provides justifications showing that any decision to allow permissive urban agricultural ordinances would have substantial support and thus would be upheld under this standard.<sup>158</sup>

First, by removing bans and adopting policies that support urban agricultural practices, municipalities are acting in furtherance of their police powers and in the interest of the health, safety, and welfare of

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154. See Basiouny, *supra* note 2 (noting the city council concern about setting a precedent for exceptions).

155. *Fasano v. Bd. of Cnty. Comm’rs*, 507 P.2d 23, 26 (Or. 1973) (“Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority . . .”).

156. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Ferris v. City of Alhambra*, 11 Cal. Rptr. 475, 479 (Dist. Ct. App. 1961) (“If the matter is debatable, if reasonable minds may differ upon the question of whether the zoning is required by or consistent with the public welfare, the courts may not interfere.”).

157. *Fasano*, 507 P.2d at 26.

158. It is important to understand a locality’s legal basis for its actions; for example, localities that currently have no urban agricultural ordinances on the books but wish to expressly allow these practices would need authority to do so, and that authority could be found in their police powers. *Supra* notes 115-123 and accompanying text. However, localities that currently ban agriculture in residential areas may make those regulations less intrusive; authority is not necessary for this sort of deregulation.

their citizens. Second, allowing urban agriculture can foster ideals of civic virtue and democratic self-governance. And finally, in deciding to support urban homesteading within municipal boundaries, localities should find support in and be bolstered by the law and economics and property rights literature, which suggests that allowing free and open use of an individual's private property promotes more efficient use of that property. This is especially true when the property is being used to produce food that may then be sold back into the local economy.

A. *Urban Agriculture as a Local Government's Tool To Further Public Health, Safety, and Welfare While Combating Industrial Agriculture's Harms*

Traditionally, municipalities enacted urban agriculture bans in furtherance of public health and welfare.<sup>159</sup> However, conceptions of harm are beginning to change; modern views of health and welfare allow homeowners and renters to use their property for some agricultural purposes.<sup>160</sup> As will be discussed in the following subsection, food that is grown at home is typically healthier than food produced by the industrial agriculture system.<sup>161</sup> Further, allowing urban homesteading also supports the general welfare because a local economy's health is tied to its food system.<sup>162</sup>

By allowing residents to use their private property to produce a portion of their food, and to sell their surplus, local governments can incrementally reduce reliance on industrially produced food and in the aggregate avoid related harms.<sup>163</sup> Harms that result from industrial agriculture processes can roughly be divided into two groups: those that impact public health and those that impact the health of the environment.

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159. *Supra* Part III.B.

160. Just as municipalities "provide clean drinking water, [and] protection from crime and catastrophe," they should also be taking steps to ensure that their residents are able to use their property for urban farming. NORDAHL, *supra* note 16, at 89.

161. Case Adams, *Why Locally-Grown Food Is Healthier*, YAHOO! VOICES (Mar. 31, 2010), <http://voices.yahoo.com/why-locally-grown-food-healthier-5743172.html>.

162. Pothukuchi & Kaufman, *supra* note 26, at 214.

163. See, e.g., *supra* note 16 and accompanying text (noting that victory gardens accounted for up to 40% of domestically consumed produce during World War II).

## 1. Public Health

Pursuant to its police powers, a municipality has the right, and some might argue a duty, to act in the interest of the public health.<sup>164</sup> Further, municipalities are already intimately involved in a number of food policy issues, including “nutrition education, food stamps, [the Special Supplemental Nutrition Program for Women, Infants, and Children], food health and safety regulation, and school breakfast and lunch programs.”<sup>165</sup> Thus it is logical that local governments should get involved in the emerging local foods trend and adopt local policies and regulations to ensure that their residents are able to use their property for urban homesteading purposes without fear of fines or prosecution. Although such policies would leave urban agriculture to remain a purely voluntary endeavor, they would have a positive impact on local public health for a number of reasons.

### a. Food Insecurity

The industrial agriculture system contributes to food insecurity in this country, which will likely become a greater problem as the world’s population increases and as oil reserves continue to be depleted.<sup>166</sup> This problem could be alleviated if more households grew their own produce or raised chickens for eggs. Thus, local governments should do what they can to ensure that their citizens have the ability to access or grow enough food to feed their families.<sup>167</sup>

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164. See, e.g., *Phillips v. Town of Oak Grove*, 968 S.W.2d 600, 603 (Ark. 1998) (recognizing “the city’s plenary duty to exercise its police power in the interest of the public health and safety of its inhabitants”); Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant’s Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165, 1234 (2002) (“Under its parens patriae powers, [government] also has a duty to care for its citizens.”). But cf. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (“[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”); Hodge, *supra* note 118, at 129-30 (“[T]he federal and most state constitutions do not create any affirmative duty for government to act in the interests of communal health.”).

165. Pothukuchi & Kaufman, *supra* note 26, at 218.

166. Food insecure individuals are those “who do not have ‘nutritionally adequate’ and ‘safe food’ available to them and individuals who do not have the ability to acquire these acceptable foods.” Christina Fox, *Teach a Man: Proactively Battling Food Insecurity by Increasing Access to Local Foods*, 4 J. FOOD L. & POL’Y 243, 245 (2008).

167. Food insecurity, like hunger, is a public health problem and thus is within the purview of the locality’s police powers. See, e.g., Mariana Chilton & Jenny Rabinowich, *Ending Childhood Hunger in America*, A.B.A. J. HUM. RTS., Winter 2010, at 14 (“[F]ood insecurity . . . is also a serious public health problem. Food insecurity among children is associated with fair and poor child health, with high hospitalization rates, and with truncated

The industrial agriculture food production system on which most Americans rely is intimately tied to, and unable to be separated from, oil.<sup>168</sup> Petroleum is used to produce and apply fertilizer, to operate farm equipment, and of course to move food from the farm to the plate<sup>169</sup> because most food sold in the United States is not grown in the community where it is consumed.<sup>170</sup> It may be imported from abroad or from across the country, but it relies on transportation, which relies on oil.<sup>171</sup> The most often cited studies demonstrate that most fresh food and produce travels anywhere from 130 to 2000 miles before it is eaten; the most commonly cited figure is 1500 miles.<sup>172</sup> Because of the dramatic increase in the price of petroleum, overreliance on oil is dangerous. As the price of oil rises, the price of food may also rise, which would lessen the ability of poorer Americans to purchase what they need.<sup>173</sup>

Further, as the population rises, there will be an increasing demand for food production, which may lead to more intensive farming methods and increased use of genetically modified crops to

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social, emotional, and cognitive development . . . among teenagers, it is associated with suicidal ideation and depression.”).

168. NORDAHL, *supra* note 16, at xiii (“Until communities figure out how to provide for themselves, instead of relying on a handful of petrophilic agribusinesses in remote locations in our country and abroad, our satiety will be tenuous.”). “[N]inety-eight percent of the food supply in the United States is produced by agribusinesses running industrial farms that employ mechanically and chemically intensive farming methods for the maximization of profit.” Peters, *supra* note 22, at 207 (citing Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & America’s 2007 Farm Bill*, 31 ENVIRONS 1, 4 (2007)).

169. Peters, *supra* note 22, at 230 (contrasting local, sustainably grown agriculture, which is not similarly dependent upon oil).

170. “Virtually all communities in the United States depend heavily upon imported food, produced far away in climates and soils non-native to the particular locality.” Wood et al., *supra* note 3, at 70 (citing THOMAS A. LYSON, *CIVIC AGRICULTURE: RECONNECTING FARM, FOOD, AND COMMUNITY* 4 (2004)).

171. Because of our industrial agriculture system, we produce a large amount of certain crops, but small amounts of others, which leads us to import those crops from other countries. See William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation’s Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 237 (2009).

172. MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 137 (2006); Wood, et al., *supra* note 3, at 71 (citing HOLLY HILL, *ATTRA, FOOD MILES: BACKGROUND AND MARKETING* (2008)). But see Jane Black, *What’s in a Number? How the Press Got the Idea that Food Travels 1,500 Miles from Farm to Plate*, SLATE (Sept. 17, 2008, 6:48 AM), [http://www.slate.com/articles/life/food/2008/09/whats\\_in\\_a\\_number.html](http://www.slate.com/articles/life/food/2008/09/whats_in_a_number.html) (arguing that food miles traveled (FMT) may be more or less than 1500 miles depending on the food and the location within the United States).

173. See *supra* note 168 and accompanying text.

produce larger products in shorter amounts of time.<sup>174</sup> Support for urban homesteading can address some of this increased demand, as it has done previously in this country. Historically, food was not produced in cities.<sup>175</sup> However, this changed during World War I, the Great Depression, and World War II, when victory gardens became a common feature of urban and suburban residences.<sup>176</sup> Viewed as an act of patriotism so that food could be freed up for shipment overseas, over twenty million individuals grew produce.<sup>177</sup>

The existence of those gardens served as an important food security tool<sup>178</sup> because farms in rural areas were not producing enough food to supply domestic homes and also ship food abroad.<sup>179</sup> To ensure success, the government instituted an education and information campaign that provided information about planting techniques and nutrition,<sup>180</sup> while state universities provided radio broadcasts discussing how to garden.<sup>181</sup> Therefore, urban agriculture is “a return to the past American tradition” and should not be viewed as implausible or unexpected.<sup>182</sup>

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174. The harms that result from industrial agriculture processes such as this are discussed *infra* Part IV.A.2.

175. Pothukuchi & Kaufman, *supra* note 26, at 215 (“A city is a human settlement whose inhabitants cannot produce, within the city limits, all of the food that they need for keeping them alive” . . . . ‘Urban’ thus came to be defined in early twentieth century texts as non-agricultural, thereby conceptually distancing food as an urban issue.” (quoting ARNOLD TOYNBEE, *CITIES ON THE MOVE* 8 (1970))).

176. Mukherji & Morales, *supra* note 17, at 2.

177. Greening Food Deserts Act, H.R. 4971, 111th Cong. § 2(a)(20) (2010); BENTLEY, *supra* note 16, at 117; NORDAHL, *supra* note 16, at 136.

178. Mukherji & Morales, *supra* note 17, at 2.

179. NORDAHL, *supra* note 16, at 17 (“The agriculture and gardening efforts during . . . periods of crisis were initiated to help secure our food supply, and the government looked to urban means of food production to supplement the rural farms that were unable to keep up with domestic demand.”).

180. Endres & Endres, *supra* note 122, at 417 (describing a “massive public information campaign that appealed to American patriotism to ‘put all idle land to work[’ and] programs that educated Americans how to grow and process food”); *see also* NORDAHL, *supra* note 16, at 118. The program was coordinated between federal, state, and local entities. *See Victory Gardens To Bloom in U.S.*, N.Y. TIMES, Jan. 12, 1942, at 19.

181. NORDAHL, *supra* note 16, at 118; Endres & Endres, *supra* note 122, at 418 n.124 (“[T]he University of Illinois at Champaign Urbana Extension Service provided a weekly seasonal broadcast on victory gardening.”). Similar educational techniques could be used today if localities decided to encourage urban agriculture.

182. Wood et al., *supra* note 12, at 19 (noting that during World War II, the “government appealed to homeowners nationally to raise their own chickens for food security”). There were, however, food rations at that time for foods that were in short supply. Endres & Endres, *supra* note 122, at 415-16. Further, it is unknown whether high levels of productivity would be sustained outside of wartime.

Local governments can look to the success of victory gardens during those former times of food insecurity and apply similar educational techniques to urban farming today.<sup>183</sup> In communities that allow urban agriculture, an individual only needs a small plot of land and a small amount of money to set up a garden or purchase or construct a suitable chicken coop.<sup>184</sup> Seeds and seedlings can often be obtained from neighbors, and chickens can be adopted from shelters. After that, access to food is readily available, thus alleviating some insecurity.<sup>185</sup>

#### b. Food Deserts

Closely tied to the problem of food insecurity is that of food deserts.<sup>186</sup> Industrial agriculture combined with restrictive zoning results in a highly concentrated system of food production that is geographically removed from urban areas. Before zoning, a person could walk down the street to a farm stand or neighborhood produce market. This is no longer true in many urban and suburban neighborhoods<sup>187</sup> and even in some rural areas.<sup>188</sup> Thus, even if an

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183. Others have suggested that local governments have a role to play in supporting urban agriculture as a means of food security. See, e.g., Peters, *supra* note 22, at 205 (“In the face of environmental, economic, and social equity challenges, it is imperative that the government . . . establish policies that promote sustainable urban agriculture to ensure access to an adequate food supply produced with minimal impact on the environment.”).

184. One problem is that many of those who are most food-insecure in the United States do not own their own homes; perhaps they rent or live in public housing. Thus their ability to use their land for urban agricultural purposes might be limited by rental agreements. Further, if they live in high-density, inner-city housing, there is often little-to-no outdoor space where they can conduct many of these activities. However, there have been tales of individuals growing vegetables in window boxes and keeping chickens inside apartments. See, e.g., Clare Trapasso, *Chickens Born and Bred in One-Bedroom Apartment as Part of Couple's Local Food Routine*, DAILY NEWS (Oct. 2, 2011), [http://articles.nydailynews.com/2011-10-02/local/30247953\\_1\\_chicken-keeping-local-food-eggs](http://articles.nydailynews.com/2011-10-02/local/30247953_1_chicken-keeping-local-food-eggs). Further, though it is beyond the scope of this Article, community gardens can serve some goals for individuals who lack the space or funds to start their own urban agricultural endeavor. See, e.g., *Community Programs & Services: Garden Program*, N.Y.C. HOUS. AUTH., <http://www.nyc.gov/html/nycha/html/community/garden.shtml> (last visited Nov. 27, 2012).

185. Of course, in certain climates, little can be grown during the winter months, and egg production in older hens may slow down.

186. Avi Brisman, *Food Justice as Crime Prevention*, 5 J. FOOD L. & POL'Y 1, 8-11 (2009); Sarah B. Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471, 519 n.218 (2012) (discussing food deserts).

187. Michael Correll, *Getting Fat on Government Cheese: The Connection Between Social Welfare Participation, Gender, and Obesity in America*, 18 DUKE J. GENDER L. & POL'Y 45, 59-60 (2010).

individual has the money or desire to purchase whole, healthy foods, they may not have access to those items. Many areas lack farmers' markets, produce stands, and even grocery stores.<sup>189</sup> Instead, people in these communities buy their food at fast-food restaurants, convenience stores, and gas stations. And even if there is a grocery store in a low-income area, research shows that it likely has a smaller and poorer-quality selection of produce than a similar store in a wealthier neighborhood.<sup>190</sup>

There is a role for governments to play in alleviating the problem of food deserts, and some states have been investing in programs to do so. For example, a Philadelphia, Pennsylvania, nonprofit has used state funding to create stores in underserved communities that can provide low-cost, healthy food.<sup>191</sup> Municipalities have also been attempting a variety of techniques to eliminate food deserts, including support for community gardens.<sup>192</sup> A locality's support for and

188. Salkin & Lavine, *supra* note 9, at 609; see Avi Brisman, *It Takes Green To Be Green: Environmental Elitism, "Ritual Displays," and Conspicuous Non-Consumption*, 85 N.D. L. REV. 329, 360 n.207 (2009).

189. See Correll, *supra* note 187, at 59-60; Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935, 944 (2010) (noting the increasing distance between farms and the consumers who eat the food that farms produce); *Food Environment Atlas*, U.S. DEP'T AGRIC., <http://www.ers.usda.gov/data-products/food-environment-atlas.aspx> (last visited Nov. 27, 2012).

190. Dunn, *supra* note 135, at 52-53; see also U.S. DEP'T HOUS. & URBAN DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION (2011), available at [http://www.huduser.org/publications/pdf/MTOFHD\\_full\\_report.pdf](http://www.huduser.org/publications/pdf/MTOFHD_full_report.pdf) (moving from a low- to a high-income community decreases risk of diabetes and obesity).

191. MARK WINNE, CLOSING THE FOOD GAP: RESETTling THE TABLE IN THE LAND OF PLENTY 187 (2008) (noting that these stores "will . . . pay off in new property taxes and jobs for those communities").

192. See, e.g., Salkin & Lavine, *supra* note 9, at 613 ("[Chicago] set[] a goal of eliminating food deserts by 2040 [by] support[ing] programs for farmers markets, farm carts and stands, fresh food delivery trucks, food cooperatives, direct sales from community gardens, and other alternative retail options."); see also Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 195-96 (2008) (noting that Pennsylvania enacted the Fresh Food Financing Initiative in 2004 to "encourage[] public and private funding for supermarket development across that state" and New Mexico created a task force to foster "'a state-financed revolving loan fund that helps cash strapped store owners in rural areas purchase produce coolers or even loading docks'" (quoting Mark Winne, *Replenishing Our Food Deserts*, STATE LEGISLATURES, Sept. 2007, at 28)); Sheila Fleischhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 44-45 (2010) ("[T]he 2008 Farm Bill expanded the USDA Fresh Fruit and Vegetable Snack Program in Schools, which may help reduce participants' purchases at corner stores after school."); Taylor H. Ranhard, Recent Development, *Healthy, Hunger-Free Kids Act of 2010*, Pub. L. No. 111-296 (2010), 24 TUL. ENVTL. L.J. 441, 444 (2011) (noting that Walmart's

promotion of voluntary urban homesteading is another way to alleviate the food desert problem.<sup>193</sup> Because of existing ordinances, many people who live in food deserts are unable to grow their own food in quantities sufficient to feed their families. A locality adopting a policy promoting urban agriculture could include an educational component to aid low-income families in planting and harvesting an urban garden or to teach school-aged children about urban gardening. If these individuals are able to grow their own food, they can save money that would otherwise be spent buying processed foods from a convenience store and gain the added bonus of contributing to a healthier diet.<sup>194</sup> Further, if they produce more than they can consume, they can sell the surplus at a local market or to a neighbor, thus supplementing their income, contributing to community cohesiveness, and helping to alleviate the food insecurity of others.<sup>195</sup>

c. Obesity, Processed Foods, and the Role of the State

The industrial food complex has resulted in food insecurity and food deserts, both of which are partially to blame for a trifecta of major American health problems: obesity, Type 2 diabetes, and heart disease.<sup>196</sup> Industrial food is often processed, packaged food. Moreover, because U.S. agriculture policy currently rewards the overproduction of corn, much excess corn is turned into high fructose corn syrup, which is included in a large number of processed foods and has been shown to play a role in both diabetes and obesity.<sup>197</sup> Many people would rather spend less for more calories. This is why

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Healthy Foods Initiative aims to eradicate food deserts by constructing new stores in underserved areas).

193. LaCroix, *Urban Agriculture*, *supra* note 25, at 236 (“[T]he city’s goals in fostering urban gardens are two-fold: gardening is by itself a productive use of land, and . . . the city is concerned about inner city ‘food deserts’ . . .”).

194. Brisman, *supra* note 186, at 42 (“[E]liminating food deserts and working towards food justice has the potential for positive public health outcomes and, in the process, to possibly prevent and reduce crime.”).

195. Mukherji & Morales, *supra* note 17, at 2 (“The produce is sold to neighborhood residents who might not otherwise have access to inexpensive fresh produce.”).

196. Morales & Kettles, *supra* note 76, at 30 (citing DEP’T OF HEALTH & HUMAN SERVS., *THE BURDEN OF CHRONIC DISEASES AND THEIR RISK FACTORS: NATIONAL AND STATE PERSPECTIVES* 29, 44 (2004)) (“[T]wo interrelated factors dominate the food/health integument: diminished access to healthy food and the rise of industrial food. Taken together, the two are believed to produce serious health problems, such as obesity and Type II diabetes.”); *see also supra* note 190 and accompanying text.

197. Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 *GEO. MASON L. REV.* 593, 612 (2010); George A. Bray et al., *Consumption of High-Fructose Corn Syrup in Beverages May Play a Role in the Epidemic of Obesity*, 79 *AM. J. CLINICAL NUTRITION* 537, 537 (2004).



fast food—high in calories but low in nutrition—is popular.<sup>198</sup> It is often easier, cheaper, and less time-consuming to buy packaged peanut butter that is loaded with sugar and oils than it is to grind fresh peanuts or to buy a hamburger and fries than to cook a meal that entails washing, chopping, and cooking vegetables and grains.<sup>199</sup> It is naive to believe that local governments will change these habits overnight by adopting a policy that allows and supports urban agriculture. However, such a policy could provide an alternative source of healthy food that could combat obesity<sup>200</sup> because foods produced in a residential backyard (vegetables, fruits, and eggs) are healthier than processed foods that are easily purchased.<sup>201</sup>

Some municipal governments have begun taking steps to alleviate the obesity epidemic in their communities. Many of them focus not on urban agriculture but on the regulation of fast-food restaurants and their menus. For example, Los Angeles, California, recently enacted a moratorium on the construction of new fast-food restaurants.<sup>202</sup> The stated justifications in support of the moratorium were that the formula retail structures are designed in a way that does not mesh with neighborhood character, that they have too much signage and parking, and that they have a negative aesthetic impact.<sup>203</sup> The subtext of the

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198. Andrea Jezovit, *Cheap Twix: Junk Food Offers More Calories for Your Cash*, GRIST (Aug. 8, 2011, 6:00 PM), <http://grist.org/food/2011-08-08-cheap-twix-more-calories-for-your-cash-in-the-junk-food-aisle/> (discussing Adam Drewnowski's research, which found that one "dollar could purchase 1,200 calories of cookies or potato chips, but only 250 calories of carrots").

199. See NORDAHL, *supra* note 16, at 35 ("[O]besity is the result of food insecurity here in America . . . it is the abundance of cheap calories derived from processed and fast food vis-à-vis the inaccessibility of fresh, wholesome, nutrient-dense foods at an affordable price that is responsible for the poor health of this nation's citizens." (emphasis omitted)).

200. For example, funding that currently goes to programs could be redirected toward teaching people to grow their own food. See Winne, *supra* note 191. It is questionable whether pro-urban agriculture policies will make a difference in the areas where industrial food-related public health maladies are occurring; are low-income people in food insecure areas the ones who want urban gardens? Regardless, if they are permitted to have them and if energy is invested in educating these communities about the positive health impacts from urban agriculture, change is possible. Further, some of these bans do exist in neighborhoods with problems discussed in this section. For example, Novella Carpenter authored a book about "urban homesteading in an impoverished area of Oakland, California," and she herself has been the target of repressive city policies aimed at curbing urban agriculture. Wood et al., *supra* note 12, at 17 (discussing NOVELLA CARPENTER, *FARM CITY: THE EDUCATION OF AN URBAN FARMER* (2009)). Although these neighborhoods are not necessarily at the forefront of the locavore movement, they could benefit from policies that support the movement.

201. Michael Pollan, *Unhappy Meals*, N.Y. TIMES (Jan. 28, 2007) (Magazine), <http://www.nytimes.com/2007/01/28/magazine/28nutritionism.t.html>.

202. City of L.A., Cal., Ordinance 180,103 (July 29, 2008).

203. *Id.*

ordinance's enactment was that fast-food restaurants cause health problems and that health-related concerns are a valid exercise of the city's police power.<sup>204</sup> Similarly, after expressly finding that "the presence of *industrially-produced* trans fat in foods prepared in food shops poses a threat to the public health," Cleveland, Ohio, adopted an ordinance that banned the use of industrially manufactured, trans fat-laden foods in certain shops and required labeling and documentation of that information.<sup>205</sup>

Although local governments have the potential to advance public health through food policy, they should consider the role that their states play before adopting legislation in this area. In some states, food policy is very much a state issue, and there are emerging preemption concerns.<sup>206</sup> For example, in New York, a state law pertaining to multiple-dwelling units prohibits the keeping of rabbits, goats, or chickens unless a local government regulation expressly allows it.<sup>207</sup> South Carolina passed a law stating, "All local laws and ordinances related to the regulation of and the enforcement of the care and handling of livestock and poultry in this State are preempted and superseded . . . ."<sup>208</sup> It appears that such a law might prohibit backyard chicken ordinances that regulated the size and location of chicken coops or the treatment of the chickens themselves. In Georgia, a proposed bill would have preempted local ordinances addressing

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204. Eloisa C. Rodriguez-Dod, *It's Not a Small World After All: Regulating Obesity Globally*, 79 MISS. L.J. 697 (2010) (discussing ordinances that prohibit fast-food restaurants); Allyson C. Spacht, Note, *The Zoning Diet: Using Restrictive Zoning To Shrink American Waistlines*, 85 NOTRE DAME L. REV. 391 (2009) (discussing the use of zoning to restrict fast-food restaurants for the purpose of improving public health).

205. Cleveland, Ohio, Ordinance 474-11 (Apr. 25, 2011). This ordinance is threatened by the subsequent adoption of a state preemption statute. OHIO REV. CODE § 3717.53(C) (2012).

206. Of course, the federal farm bill sets food policy at a national level. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651. For a summary of problems with the current subsidized industrial agriculture system and the farm bill, see William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVT. L. Rep. News & Analysis (Env'tl. Law Inst.) 10,493, 10,493 (June 2009) ("By encouraging large-scale, monoculture megafarms, a subsidized industrial agriculture system leads to severe environmental consequences such as water pollution from fertilizer and pesticide runoff, soil erosion, and effects on wildlife and biodiversity, such as fragmented habitats and species decline."); Peters, *supra* note 22, at 208 (discussing "large, monocultural farms heavily reliant on chemical pesticides and fertilizers, mechanization, and irrigation").

207. N.Y. MULT. DWELL. LAW § 12(2) (2012).

208. S.C. CODE § 47-4-160(C) (2012); see Elizabeth R. Springsteen, *A Proposal To Regulate Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 DRAKE J. AGRIC. L. 437, 457-58 (2009).

agriculture and prohibited the sale of homegrown vegetables or animal products.<sup>209</sup>

Municipalities should also be aware that some states have passed new preemption laws that curb the ability of a municipality to regulate obesity. These laws typically preclude local regulation of restaurant menus, meal contents, and labeling.<sup>210</sup> Thus, a locality that plans to justify its urban agriculture plan as a form of regulation in furtherance of public health and food choice should first determine whether its state has adopted such a law, and if so, how broad it is.<sup>211</sup>

For example, the Ohio State Legislature recently passed a law saying that a municipality cannot require a restaurant to provide health information about its menu items, nor can it pass local ordinances that address “food-based health disparities.”<sup>212</sup> A 2010 Tennessee statute prohibits localities from enacting ordinances or rules “pertaining to the provision of food nutritional information” or regulating menus in any other way.<sup>213</sup> In Arizona, the legislature recently enacted a statute prohibiting localities from regulating the use of “consumer incentives”—things like toys, games, coupons, or prizes—associated with a meal, such as those that come with Happy Meals.<sup>214</sup> The Arizona law was enacted in response to ordinances, like that passed in

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209. Springsteen, *supra* note 208, at 457. On March 11, 2010, the “House Committee [f]avorably [r]eported.” Summary of HB 842, GA. GEN. ASSEMB. (Oct. 13, 2010, 1:45 AM), [http://www1.legis.ga.gov/legis/2009\\_10/sum/hb842.htm](http://www1.legis.ga.gov/legis/2009_10/sum/hb842.htm). Notably, the purpose of this bill was to prohibit localities from banning or requiring permits in order to grow or raise crops, chickens, rabbits, or goats on private property, subject to certain lot size restrictions. H.R. 842, 2010 Gen. Assemb., Reg. Sess. (Ga. 2010).

210. See, e.g., ALA. CODE § 20-1-7(a) (2012) (“The subject matter of the regulation of nutrition labeling of food that is a menu item in restaurants, retail food establishments, and vending machines is reserved to the Legislature and may be regulated only by an act of the Legislature of statewide application enacted after June 9, 2011.”); FLA. STAT. § 509.032(7)(a) (2012) (“The regulation of public lodging establishments and public food service establishments, including . . . matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state.”); GA. CODE § 26-2-373 (2012) (“[N]o county board of health or political subdivision of this state shall enact any ordinance or issue any rules and regulations pertaining to the provision of food nutrition information at food service establishments.”).

211. If a preemption law does exist, perhaps the best justification for urban agriculture programs is based in civic virtue or efficiency. See discussion *infra* Part IV.C.

212. See H.R. 153, 129th Gen. Assemb., Reg. Sess. § 3717.53 (Ohio 2011); Stephanie Strom, *Local Laws Fighting Fat Under Siege*, N.Y. TIMES (June 30, 2011), <http://www.nytimes.com/2011/07/01/business/01obese.html>.

213. TENN. CODE § 68-14-303(3) (2012); see UTAH CODE § 10-8-44.5(1) (2012) (“A municipality may not regulate the dissemination of nutritional information or the content required to be placed on a menu, menu board, or food tag by a restaurant, eating establishment, or other food facility.”).

214. ARIZ. REV. STAT. § 44-1380 (2012).

Santa Clara, California, whose purpose is “to improve the health of children and adolescents in the County by setting healthy nutritional standards for children’s meals accompanied by toys or other incentive items.”<sup>215</sup>

These state-level preemption laws are problematic because they may discourage cities from adopting wide-ranging urban agriculture policies and regulations. However, localities would have a strong argument that they should not apply to urban agriculture ordinances. If an overriding goal of the state statutes is to protect restaurants from having to comply with a patchwork or “crazy quilt” of local regulations, that goal would not be affected by individuals raising chickens or vegetables in their yards.<sup>216</sup> If such an argument is unsuccessful, and if states continue to prohibit localities from enacting regulations that might serve to reduce the obesity epidemic that plagues many communities in this country, we run the risk of stifling a possible path to change.

Although some commentators have set forth proposals for change at the federal level,<sup>217</sup> federal farm subsidies are deeply entrenched, and thus far no change is forthcoming (although Congress recently renounced support for corn-based ethanol subsidies).<sup>218</sup> And although state-level policies can guide local governments in their consideration of urban agriculture policies, they may not be as successful as the policies put in place by local governments

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215. SANTA CLARA CNTY., CAL., CODE § A18-350 (2012).

216. *Utah May Ban Regulation of Nutritional Info*, IFT (Feb. 27, 2009), <http://www.ift.org/Food-Technology/Daily-News/2009/February/27/Utah-may-ban-regulation-of-nutritional-info.aspx> (noting that the senator who sponsored the bill said menu-labeling “rules should apply statewide, if at all”); see *Town of Mt. Pleasant v. City of Racine*, 127 N.W.2d 757, 760 (Wis. 1964); Strom, *supra* note 212 (noting that the National Restaurant Association believed it was in “the best interests of the consumer to have one uniform standard”).

217. Food, Conservation, and Energy Act of 2008, H.R. 6124, 110th Cong.; see, e.g., Angelo, *supra* note 197, at 645-46 (suggesting a “complete rethinking of commodity subsidy programs”); Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1793 (2004) (criticizing “[t]he availability of cheap corn [and how it] has reshaped the entire universe of the food industry, as well as the universe of food in our society,” particularly with regard to obesity); Sarah Harwood, Comment, *United States Farm Bill—An Antiquated Policy?*, 88 U. DET. MERCY L. REV. 377 (2010) (discussing harms created by subsidies); Margaret Sova McCabe, *Foodshed Foundations: Law’s Role in Shaping Our Food System’s Future*, 22 FORDHAM ENVTL. L. REV. 563, 575 (2011) (observing that “[e]vidence of federal domination is abundant” and advocating for implementation of a “regional foodshed compact”).

218. *Congress Ends Era of Ethanol Subsidies*, NPR (Jan. 3, 2012), <http://www.npr.org/2012/01/03/144605485/congress-ends-era-of-ethanol-subsidies> (“Congress let the formerly sacred subsidies expire after more than 30 years and about \$20 billion.”).

themselves. Real change can happen—and is happening—at the local level.<sup>219</sup>

#### d. Food Safety

It is impossible to talk about industrial food and public health without briefly mentioning food safety. Although experts debate whether small and/or urban farms really produce safer food than large-industrial agriculture does, the main argument is that the purchaser knows the farmer, so if there is a problem, it is easily traceable and will not have national impacts like some of the recent *E. coli* outbreaks.<sup>220</sup> Further, some pathogens are caused by animal feces that get into water that is then used for crop irrigation; this is less likely in urban centers and suburbs, which typically contain fewer animals, and where crops are often watered with potable municipal water.<sup>221</sup> Finally, research has demonstrated that chickens that are raised in stressful environments, such as those found on factory farms, are more likely to produce eggs containing harmful bacteria, such as salmonella.<sup>222</sup> Thus, some suggest that backyard chickens are less likely to produce harmful eggs.<sup>223</sup>

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219. NORDAHL, *supra* note 16, at 126 (“Centralized policies, regardless of their reform aims, tend to be of a one-size-fits-all mold. Such a policy regarding food would likely erase the unique traditions and customs of our celebrated ethnic diversity expressed through food and cuisine . . .”).

220. Wood et al., *supra* note 12, at 9 (“[D]isease outbreaks in locally produced food systems are more isolated and therefore more contained.”); *How To Protect Yourself from Food Poisoning*, ABC NEWS (July 17, 2011), <http://abcnews.go.com/Health/Wellness/protect-food-poisoning/story?id=14022017> (“It’s hard to find the exact source of a food-borne illness because it typically takes two to three days for the first symptoms of an infection to appear . . . . Moreover, contamination might not be from a specific farm or food, but from a point of distribution.” (internal quotation marks omitted)).

221. NORDAHL, *supra* note 16, at 28. Compare Thomas Kriese, *What To Do with Urban Chicken Poop?*, URB. CHICKENS NETWORK BLOG (Feb. 5, 2009, 8:44 AM), <http://www.urbanchickens.net/2009/02/what-to-do-with-urban-chicken-poop.html> (discussing concerns of phosphorous runoff into water supplies from chicken feces), with Thomas Kriese, *Benefits Checklist for Urban Chickens*, URB. CHICKENS NETWORK BLOG (Feb. 2, 2010, 4:34 PM), <http://urbanchickens.net/2010/02/on-benefits-of-urban-chickens.html> (discussing benefits that the high nitrogen content of chicken feces has on compost).

222. *An HSUS Report: Food Safety and Cage Egg Production*, HUMANE SOC’Y OF THE U.S. 2-5 (May 2011), [http://www.humanesociety.org/assets/pdfs/farm/report\\_food\\_safety\\_eggs.pdf](http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf).

223. *Id.* at 5 (finding “no Salmonella in eggs from either [barren caged birds or cage-free hens] or a trend towards higher infection rates in eggs from caged hens compared to barn-raised birds” (emphasis omitted)); *infra* note 251 and accompanying text. But see James McWilliams, *Backyard Chickens: A Trend Coming Home To Roost?*, FREAKONOMICS (July 27, 2011, 12:02 PM), <http://www.freakonomics.com/2011/07/27/backyard-hens-a-trend-coming-home-to-roost/> (“To the best of my knowledge . . . nobody has calculated comparative rates of infection between backyard and industrialized birds.”).

## 2. Environmental Harm

Although the public health problems that industrial agriculture visits upon communities are serious, the environmental harms are just as noxious. And just as many of the public health problems addressed above can be alleviated through a shift in focus from national, industrial agriculture to local, urban homesteading, many of the environmental harms that result from industrial agriculture can be dramatically reduced through a renewed focus on, and governmental support for, urban agriculture. The city of San Francisco, California has recognized this by seeking to “[r]educe the environmental impacts associated with food production, distribution, consumption, and disposal by increasing our reliance on regional and sustainable food resources.”<sup>224</sup> Other municipalities should follow suit.

### a. FMT and Climate Change

A common rallying cry of the locavore movement relates to “food miles traveled” (FMT). Processed food typically has to be shipped long distances to reach its destination.<sup>225</sup> Thus locavores put a great deal of stock in how far food must travel, typically on oil-burning trucks that drive thousands of miles on asphalt highways, but more frequently now on ships and planes as well. Some locavores will only eat food grown within one hundred miles of their homes.<sup>226</sup> There are a number of reasons for this: the food will be fresh and can be eaten soon after harvest, it will be in season, and because it will have traveled only a short distance, it will have a light carbon footprint.

However, some recent studies are refuting the carbon footprint element of the FMT calculation as too simplistic.<sup>227</sup> Specifically, FMT fails to take into account the energy used in producing the food—the phase during which some argue the most greenhouse gases are

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224. ROOTS OF CHANGE, THE FINAL RECOMMENDATIONS OF THE SAN FRANCISCO URBAN-RURAL ROUNDTABLE 8 (2009), [http://www.sfgov3.org/ftp/uploadedfiles/sffood/policy\\_reports/FinalURRRecommendations0709.pdf](http://www.sfgov3.org/ftp/uploadedfiles/sffood/policy_reports/FinalURRRecommendations0709.pdf).

225. Czarnecki, *supra* note 134, at 271 (discussing “the negative environmental impact of food packaging and shipping”).

226. *See, e.g.*, Burros, *supra* note 15.

227. *See, e.g.*, JAMES E. MCWILLIAMS, JUST FOOD: WHERE LOCAVORES GET IT WRONG AND HOW WE CAN TRULY EAT RESPONSIBLY 17-52 (2010) (“Food Miles or Friendly Miles?: Beyond the ‘Farm to Fork’ Paradigm of Production”); Christopher L. Weber & H. Scott Matthews, *Food-Miles and the Relative Climate Impacts of Food Choices in the United States*, 42 ENVTL. SCI. & TECH. 3508 (2008) (finding that transportation-related emissions are a relatively small part of food’s greenhouse gas emissions and arguing that a change in diet is more effective at reducing emissions than buying locally sourced food).

released—and only considers the energy used in transporting it.<sup>228</sup> Rather, perhaps the most efficient use of resources, and the smallest use of energy, is to grow food where it grows best (for example, do not heat a greenhouse to grow tomatoes in Maine in the middle of winter) and worry less about transportation costs.<sup>229</sup>

Even if one were to accept that FMT is a false indicator of environmental health or greenhouse gas contributions,<sup>230</sup> individuals who grow their own produce and harvest their own eggs still contribute less to climate change than those who purchase those same products at a grocery store.<sup>231</sup> For example, chickens that roam in a backyard consume bugs, weeds, and slugs, reducing “the need for [petrochemical-based] commercial slug bait, pesticides, and herbicides,” and the pollution associated with these products.<sup>232</sup> Chickens also consume food scraps, which reduces the amount of food waste thrown away. In contrast, many processed foods are also packaged foods. This means that the packaging must be created, which uses energy,<sup>233</sup> and once the food is used, the packaging must be

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228. See CAROLINE SAUNDERS ET AL., AGRIBUSINESS & ECON. RESEARCH UNIT, LINCOLN UNIV., FOOD MILES—COMPARATIVE ENERGY/EMISSIONS PERFORMANCE OF NEW ZEALAND’S AGRICULTURE INDUSTRY 93 (2006), [http://www.lincoln.ac.nz/documents/2328\\_rr285\\_s13389.pdf](http://www.lincoln.ac.nz/documents/2328_rr285_s13389.pdf) (calling the FMT calculation “spurious”); Vasile Stănescu, “Green” Eggs and Ham? *The Myth of Sustainable Meat and the Danger of the Local*, 8 J. FOR CRITICAL ANIMAL STUD. 8, 9 (2010) (describing the “false pastoral narrative” associated with locavorism); Weber & Matthews, *supra* note 227, *quoted in* Stănescu, *supra*, at 12–13.

229. See Stephen Budiansky, Op-Ed, *Math Lessons for Locavores*, N.Y. TIMES (Aug. 19, 2010), <http://www.nytimes.com/2010/08/20/opinion/20budiansky.html> (“The best way to make the most of these . . . resources of land, favorable climates and human labor is to grow lettuce, oranges, wheat, peppers, bananas, whatever, in the places where they grow best and with the most efficient technologies—and then pay the relatively tiny energy cost to get them to market, as we do with every other commodity in the economy.”). Further, Edward Glaeser’s recent op-ed cautions that urban agriculture could result in lower density, which actually means more greenhouse gas emissions. Edward L. Glaeser, Op-Ed, *The Locavore’s Dilemma: Urban Farms Do More Harm than Good to the Environment*, BOS. GLOBE (June 16, 2011), [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2011/06/16/the\\_locavores\\_dilemma/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2011/06/16/the_locavores_dilemma/) (“Urban farms mean less people per acre which in turn means longer drives and more gasoline consumption.”). Because population is increasing and global hunger is a real problem, all these environmental issues should be considered together.

230. *Supra* notes 227–229 and accompanying text.

231. See *The Issues: Fossil Fuel and Energy Use*, SUSTAINABLE TABLE, <http://www.sustainabletable.org/issues/energy/> (last visited Nov. 11, 2012). Further, gas is saved by not having to drive to the grocery store as frequently. John Reinhardt, *Will a Spike in Gas Prices Pique Interest in Urban Gardens?*, GROWN CITY (Mar. 29, 2011), <http://www.growinthe.city.com/2011/03/will-a-spike-gas-prices-pique-interest-urban-gardens>.

232. Wood et al., *supra* note 12, at 20.

233. Andrew Martin, *If It’s Fresh and Local, Is It Always Greener?*, N.Y. TIMES (Dec. 9, 2007), <http://www.nytimes.com/2007/12/09/business/yourmoney/09feed.html> (discussing research of Tom Tomich, director of the University of California Sustainable Agriculture

disposed of or recycled, both of which fall on the city.<sup>234</sup> So, adopting a policy that promotes urban agriculture should have an overall positive impact on a community's carbon footprint.<sup>235</sup>

#### b. Monocultures

Scientists and commentators are beginning to recognize the environmental harms and potential catastrophe that "monocropping," a common agribusiness practice, may cause.<sup>236</sup> Two scholars succinctly explained why a small, diversified, urban food system is better for the environment than the current industrial system:

The typical mono-cropping, coupled with reliance on fossil fuels and long range transportation networks, create a complicated and inflexible system that lacks resiliency. . . . A complex system, on the other hand, consisting of multiple local/regional food systems is more resilient, as redundancies and adaptive institutions may compensate for the failure of one 'gear' in the system.<sup>237</sup>

Permitting residents to use their property for small-scale agriculture contributes to this safer, more complex system. Moreover, because many urban homesteaders practice organic gardening techniques, by

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Research and Education Program, and noting that locavores should also consider how food is packaged, grown, and processed).

234. Wood et al., *supra* note 3, at 71.

235. See, e.g., *Davis Climate Action & Adaptation Plan*, CITY OF DAVIS, <http://archive.cityofdavis.org/cdd/sustainability/DCAAP/ClimateActionPlan.cfm> (last visited Nov. 27, 2012) ("[The Davis plan] is designed to place the community on a path to achieve the greenhouse gas emission reduction targets."); *Sustainability*, ASHEVILLE, N.C., <http://www.ashevilenc.gov/Departments/Sustainability.aspx> (last visited Nov. 27, 2012) ("In April 2007 City Council passed a resolution committing to reduce the municipal carbon footprint 80% by the year 2050 and requiring a strategic plan to lead this effort.").

236. See Angelo, *supra* note 197, at 606 (noting that the "shift from perennial rotation of crops to large single crop monocultures, such as most corn fields, has led to erosion of topsoil"); Czarnezki, *supra* note 134, at 263-64 ("Industrial farming techniques such as over-tilling, a lack of crop rotation, use of inorganic fertilizers and pesticides, and the agricultural practice of monoculture mine the soil of its natural nutrients, destroys soil biota and its habitat, and increases erosion."); Harwood, *supra* note 217, at 393-94 (discussing environmental harms caused by monoculture farming); Helena Norberg-Hodge, *Global Monoculture: The Worldwide Destruction of Diversity*, in *THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE* 58 (Andrew Kimbrell ed., 2002) (arguing that a decline in biological and cultural diversity threatens our long-term sustainability); Peters, *supra* note 22, at 210 ("Industrial monocultural farming focuses on large-scale production of a single crop; as a result, land is overcultivated, crops are not rotated, and cover crops that protect topsoil between growing seasons are not employed."); Matthew Rich, Note, *The Debate over Genetically Modified Crops in the United States: Reassessment of Notions of Harm, Difference, and Choice*, 54 CASE W. RES. L. REV. 889, 899 (2004) (suggesting that genetically modified crops are necessary to support monoculture farming).

237. Endres & Endres, *supra* note 122, at 406-07 (footnote omitted).



eschewing chemical fertilizers, and often planting heirloom seeds, the biodiversity of the crops they are growing is preserved.

c. Water Runoff and Pesticides

Intensive industrial agriculture uses a lot of water, which can carry chemical fertilizers and pesticides into waterways, contributing to pollution.<sup>238</sup> Indeed, a number of cities have recognized the harms pesticides impose on city waterways and have thus banned their application on city-owned and -maintained properties.<sup>239</sup> Further, monocropping results in large swaths of simultaneously and uniformly farmed land, which increases the likelihood of runoff traveling “from one bare field . . . across many.”<sup>240</sup> In contrast, small urban garden plots and chicken coops often require less water than a standard lawn, thus reducing the burden on municipal water supply.<sup>241</sup> Further, because fewer petrochemicals are used on urban garden plots, the likelihood of those products reaching waterways is reduced.<sup>242</sup>

Lawns, which are often treated with chemicals, are another key contributor to urban and, especially, suburban water pollution, negatively impacting water quality due to storm water and irrigation runoff.<sup>243</sup> Despite these problems, lawns are the most irrigated crop in

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238. Angelo, *supra* note 197, at 606 (“[M]ore than two billion tons of sediment enter the nation’s waterways each year [which] can clog streams and fill in shallow areas in water bodies, thereby reducing habitat and light availability to submersed plants.” (footnote omitted)).

239. See, e.g., ARCATA, CAL., MUN. CODE §§ 5490-5492 (2012) (“The migration of pesticides into the City’s watercourses, water bodies and wetlands poses a severe threat to the health of the environment” and banning “pesticides on or in any city owned, operated or maintained property.”); FAIRFAX, CAL., MUN. CODE § 8.40.30 (2012) (banning pesticide use by the town on “parks, open space parcels and public rights of way and buildings owned and maintained by the Town”); S.F., CAL., ENV’T CODE §§ 302-304 (2012) (calling for a phased reduction in pesticide use); Albany, N.Y., Ordinance 34.51.11(MC) (June 1, 2011) (calling for the same).

240. John Boardman et al., *Socio-Economic Factors in Soil Erosion and Conservation*, 6 ENVTL. SCI. & POL’Y 1, 3 (2003).

241. “Growing a plot of vegetables can actually reduce a front yard’s water consumption and benefit the community in drier times.” Cary, *supra* note 41.

242. However, cities should carefully regulate disposal of animal feces because this type of pollutant is “more easily washed into surface waters” in urban areas than rural. Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLO. L. REV. 431, 442 (2011).

243. *Did You Know . . . Growing Vegetables in Your Front Yard Is Against the Law?*, *supra* note 43. Pesticide loads from suburban and urban areas are often higher than agricultural areas. For example, in New York City, pesticide use for lawn care and pest control exceeds use for agricultural activities. *New York City*, ENVTL. ADVOCATES, [http://web.archive.org/web/20080906161159/http://www.envadvocates.org/public\\_html/Pest/](http://web.archive.org/web/20080906161159/http://www.envadvocates.org/public_html/Pest/)

the United States, and watering them consumes vast amounts of potable municipal water.<sup>244</sup> Some localities have taken action against this practice. Las Vegas, Nevada, has limited the planting of new lawns,<sup>245</sup> while other cities require a property owner to notify their neighbors if they plan to use pesticides.<sup>246</sup> Localities could go further by allowing or encouraging residents to replace their lawns with native plants or edible crops, which would reduce many of these harms and contribute to sustainability goals.

d. Animal Welfare

Finally, the meat-industrial complex results in dramatic harm to animals and in turn to the humans who consume them and their products.<sup>247</sup> While a discussion of the abuse and suffering that takes place in factory farms is beyond the scope of this Article, a few points should be made. First, many people who raise backyard chickens for eggs interact with these traditional “food” animals on a personal level, often viewing them as pets.<sup>248</sup> These interactions could lead to changed perceptions, and perhaps treatment, of traditional food animals.

Further, there is a well-documented link between animal abuse and violence toward humans.<sup>249</sup> By integrating people with nonhuman

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Toxic\_Treadmill/nyc.html (last visited Nov. 27, 2012) (accessed through the Internet Archive).

244. *Did You Know . . . Growing Vegetables in Your Front Yard Is Against the Law?*, *supra* note 43.

245. LAS VEGAS, NEV., MUN. CODE § 14.11.140-.150 (2012) (prohibiting new turf in non-residential areas, in common areas of single- and multifamily residential areas, and in residential front yards).

246. *See, e.g.*, FAIRFAX, CAL., MUN. CODE § 8.40.30 (2012) (requiring forty-eight hours’ notice of pesticide application on private property to neighbors); N.Y.C., N.Y., ADMIN. CODE § 17-1102 (2012) (same).

247. For a discussion of the harms associated with factory farming, see generally A. Christine Green, Commentary, *The Cost of Low-Price Organics: How Corporate Organics Have Weakened Organic Food Production Standards*, 59 ALA. L. REV. 799 (2008) (criticizing corporate organic factory farms), and Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65 (2009) (discussing the cruelty of factory farms).

248. Keith Goetzman, *Are Backyard Chickens Pets or Food?*, UTNE READER (Dec. 17, 2010, 4:33 PM), <http://www.utne.com/Wild-Green/Are-Backyard-Chickens-Pets-or-Food.aspx> (“People want to get closer to their food, but often that means getting closer to eggs, but not to meat—few want to eat an animal they know by name.” (internal quotation marks omitted)); Adrian Higgins, *Hot Chicks: Backyard Chicken Keeping Is Catching on, Legal or Not*, WASH. POST (May 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301051.html> (“‘Chickens are America’s cool new pet,’ said Dave Belanger, publisher of the magazine *Backyard Poultry*.”).

249. *E.g.*, Arnold Arluke et al., *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, 14 J. INTERPERSONAL VIOLENCE 963 (1999); FRANK R.

animals through urban homesteading, the former might develop a greater respect for the latter, and thus be less likely to harm them and, in turn, other humans. From an animal-welfare perspective, nonhuman animals also benefit from urban homesteading as compared to life in a concentrated animal feeding operation (CAFO);<sup>250</sup> backyard animals typically have more room and are able to exhibit more natural behavior patterns.<sup>251</sup> Indeed, if a city decides to allow chickens, the ordinance could expressly state how much space they must be given and how they must be treated.<sup>252</sup>

Finally, there are a number of environmental benefits to housing certain animals on urban farms. On preindustrial farms, farmers fed their chickens kitchen scraps, used them to manage weeds, and used their on-site animals' waste to fertilize crops. Now, one of the biggest problems with CAFOs is environmental pollution and water contamination caused by excessive amounts of animal waste.<sup>253</sup> Although animal waste in urban and suburban areas would need to be managed so as to avoid water pollution problems, the scale would be much smaller than that of a CAFO, and thus the harms would be reduced.

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ASCIONE, *The Abuse of Animals and Human Interpersonal Violence: Making the Connection*, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION 50 (Frank R. Ascione & Phil Arkow eds., 1999); Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1 (1998); Sharon L. Nelson, *The Connection Between Animal Abuse And Family Violence: A Selected Annotated Bibliography*, 17 ANIMAL L. 369 (2011).

250. Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 397-98 (1996) (suggesting that animal welfare "assumes the legitimacy of treating animals instrumentally as means to human ends as long as certain 'safeguards' are employed," while animal rights "'demand' the end of institutionalized animal exploitation" (quoting JAMES M. JASPER & DOROTHY NELKIN, *THE ANIMAL RIGHTS CRUSADE* 5 (1992))).

251. *An HSUS Report: Food Safety and Cage Egg Production*, *supra* note 222.

252. *See, e.g.*, CHEROKEE CNTY., GA., ZONING ORDINANCE § 7.7-24(a)(1)(iv)-(v) (2012) (requiring two square feet per hen in the coop and ten in the fenced enclosure); PORTLAND, ME., CODE § 5-404(a), (b)(1) (2012) ("The chicken pen must provide adequate sun and shade and must be impermeable to rodents, wild birds, and predators."); ANN ARBOR, MICH., CODE tit. IX, ch. 107, § 9:42(3)(k) (2012) ("All enclosures . . . shall be so constructed or repaired as to prevent rats, mice, or other rodents from being harbored underneath [or] within."); KNOXVILLE, TENN., CODE § 5-107(f)(3) (2012) (requiring two square feet per hen in the henhouse and six in the fenced enclosure); *see also* Salkin, *supra* note 62, at 5-7.

253. Angelo, *supra* note 197, at 606-07 (discussing animal waste at CAFOs).

*B. Civic Virtue: Strengthening Community and Private Property Interests*

Another reason that localities should allow urban agriculture within their boundaries is that doing so may further principles of civic virtue, which is an important role of local government. Civic virtue, like civic republicanism, focuses on cultivating behaviors and traits in individuals that contribute to the strength of the community as a whole, including self-sufficiency, philanthropy, and reciprocity.<sup>254</sup> Thus, one role of municipalities is to foster civic virtue by legislating in the interest of the community at large.<sup>255</sup>

Urban agriculture presents a provocative lens through which to examine civic virtue. A local government that allows unlimited forms of urban homesteading—ten-foot-tall bean poles in the front yard, chickens wandering about the property—is aiding individual landowners who desire to use their property in this manner. To those individuals, the government's decision to be permissive allows for their self-reliance and furthers their right to use their private property as they wish. Some might view this as counter to principles of civic virtue. For instance, Richard Epstein observed:

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254. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000) (highlighting reciprocity as a civic virtue); James Madison, *Republican Distribution of Citizens*, NAT'L GAZETTE, Mar. 5, 1792 ("The class of citizens who provide . . . their own food . . . may be viewed as the most truly independent and happy. They . . . are the best basis of public liberty, and the strongest bulwark of public safety."); see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 134 (1995) (discussing civic republicanism's "emphasis on communities rather than individuals"); Carlton Morse, Note, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. CAL. L. REV. 793, 819 (2007) ("[T]he foundation of republican politics is 'civic virtue,' not individual self-interest. Civic virtue is a transcendent public good determined through deliberation between political actors willing to suspend individual interest and instead derive their motivation from, and legislate according to, a consensus view of the public good." (footnote omitted)). See generally Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1720 (1988) (discussing civic republicanism and civic virtue in the context of associations).

255. Many commentators discuss the benefits of democratic self-governance and the belief that democracy is key to local control. Alexis de Tocqueville believed that participation builds political skills, and protects against tyranny. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 62-70 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) ("[T]ownships and other participatory groups were little schools of citizenship where people could form clear ideas about their rights and duties, while acquiring habits of deliberation and mutual accommodation."). Jerry Frug believes that people who can govern themselves are happier, but they will only participate if their participation will have an impact. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048, 1077 (1996) ("[T]he role that cities ought to play in American society[—which] should inform the meaning of . . . land-use policy—is community building.").

It is often said that a theory that stresses the importance of private property . . . ignores the role of civic virtue—devotion to public service, protection of the weak, advancement of the arts, participation in public life—which is central to understanding the highest aspirations of political life.<sup>256</sup>

However, at least with respect to urban agriculture, by strengthening the individual's ability to use their private property, a municipality can also foster civic virtue and a robust sense of place in the community, which in turn furthers the ideals of democratic self-governance.

The community benefits from the individual's action because urban agriculture results in a number of positive externalities that flow to, and help to build, the broader community. If there is surplus produce, its sale at farm stands and farmers' markets can build community,<sup>257</sup> or it can be donated to neighbors in need or food banks, furthering philanthropy and reciprocity.<sup>258</sup> Urban agriculture also opens a dialogue between neighbors that often results in shared meals and traded foods, reinforcing a sense of belonging and reducing atomization.<sup>259</sup> Though individual traits are strengthened through urban agriculture, individuals are not isolated, and are instead engaged with their community.<sup>260</sup> Commentators have noted that more public

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256. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 344 (1985).

257. "Municipal policies can help community gardeners make money by allowing them to sell excess produce." *Promoting Urban Agriculture: Zoning*, SUSTAINABLE CITIES INST., [http://www.sustainablecitiesinstitute.org//view/page.basic/report/feature.report/Report\\_Zoning\\_Urb\\_Ag.jsessionid=F40F194744D5D95FC907272C421AA033](http://www.sustainablecitiesinstitute.org//view/page.basic/report/feature.report/Report_Zoning_Urb_Ag.jsessionid=F40F194744D5D95FC907272C421AA033) (last visited Nov. 27, 2012). If residents are permitted to sell excess produce or eggs to their neighbors or to local markets, the taxes from those sales could remit to the local government. Cities could also sell their own value-added goods from produce grown on municipally owned property. The University of California at Davis does this by bottling and selling olive oil from the olive trees on its campus. NORDAHL, *supra* note 16, at 98 (noting that the process "turn[s] maintenance crews into moneymakers by exploiting the demand for locally produced food").

258. PUTNAM, *supra* note 254, at 19 (reciprocity as a civic virtue).

259. NORDAHL, *supra* note 16, at 141 (citing LUC J.A. MOUGEOT, *GROWING BETTER CITIES: URBAN AGRICULTURE FOR SUSTAINABLE DEVELOPMENT*, at vi (2006)); PUTNAM, *supra* note 254, at 287 (discussing the erosion of social capital and civic engagement); see COOKING, EATING, THINKING: *TRANSFORMATIVE PHILOSOPHIES OF FOOD* (Deane W. Curtin & Lisa M. Heldke eds., 1992) (addressing the social, political, religious, and philosophical aspects of food); Robin Kortright, *Edible Backyards: Residential Land Use for Food Production in Toronto*, CITY FARMER NEWS (Mar. 10, 2008), <http://www.cityfarmer.info/2008/03/10/edible-backyards-residential-land-use-for-food-production-in-toronto/> ("Special foods are part of our culture, and eating together can bring people closer to each other."); *supra* Part IV.A.

260. Putnam, *supra* note 254, at 19 ("[S]ocial capital is closely related to what some have called 'civic virtue.' The difference is that 'social capital' calls attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social

forms of urban agriculture, such as community gardens, are “helping to attain broad civic aims, such as . . . boosting civic pride and building community; reducing crime; [and] strengthening our connection to place.”<sup>261</sup> If municipalities revise their zoning codes to encourage productive landscapes, and if there is sufficient citizen desire and education to follow through, that analysis should be transferable to urban food production on private property as well, because neighbors engage in an exchange of information and food.

*C. Support for the Free Market: Efficiency, Property Values, and Nuisance Protection*

Localities can also find support for overturning urban agriculture bans in libertarian property ideals, which here coincide with environmental and civic virtue justifications. Many libertarian scholars and law and economics scholars argue that land can be used more efficiently when there are fewer restrictions upon it.<sup>262</sup> For example, Epstein suggested:

Zoning stands in stark contrast to a system of private property, which allows a single owner (within the confines of the nuisance limitation) to decide how to use his plot of land. Where property rights are enforced,

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relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.”).

261. NORDAHL, *supra* note 16, at 7 (providing analysis and studies focusing on community gardens and planting on publicly owned open space); Peters, *supra* note 22, at 227 (“Transforming vacant lots into thriving urban gardens brings people together, giving them a common goal of beautifying their neighborhoods while producing healthy food. . . . The beautification of once vacant lots and the increased sense of community make urban neighborhoods safer and more attractive places to live, which, in turn, revitalizes urban neighborhoods.”).

262. See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986) (“The usual economic approach to property law suggests that productive efficiency will be enhanced when private property is the norm, but government intervenes in recognized instances of market failure.”); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 587 (2007) (citing Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993)) (describing Ellickson’s argument that when small and medium land use activities (including tomato gardens), which only impact the individual landowner or a small group of neighbors, predominate “individual private property ownership is the most efficient arrangement”). But see Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 816 (1991) (“The bulk of evidence on suburban land use regulation supports the conclusion that as currently practiced restrictive zoning is inefficient. Nevertheless, this observation does not mean that eliminating all restrictive land use regulation would be more efficient than the status quo.” (footnote omitted)).

owners can make choices on efficient land use without having to overcome the conundrums of collective choice.<sup>263</sup>

Thus, assuming a world with no restrictions (and no transaction costs), people will use their private property in the most efficient way possible.<sup>264</sup> Further, land that is unburdened by regulations and is able to be used in an efficient manner theoretically corresponds to an increase in property values.<sup>265</sup> Therefore, municipalities would likely benefit financially from liberalizing bans that encourage inefficient use of land.<sup>266</sup> Further, if homeowners believe that attracting and retaining locavores will improve their property values, Fischel's homevoter hypothesis suggests that the homeowners will encourage their local representatives to vote in favor of permissive urban agriculture policies.<sup>267</sup>

The removal of inefficient bans does not mean that there will be no protection for aggrieved neighbors who disapprove of excessive agricultural uses; standard nuisance law protections would remain in place even if these bans were lifted.<sup>268</sup> Additionally, even if a

263. EPSTEIN, *supra* note 256, at 265.

264. See ELLICKSON & BEEN, *supra* note 20, at 768-71 (citing Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)) ("Coase argues that, in a world of costless market transaction, there would be no externalities because any outsiders affected by a land use activity would bring home those effects by, for example, offering to pay the land user to alter the activity.").

265. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105, 118 (2006) ("If the landowner is acting to maximize the value of her land, then removing a binding constraint would presumably raise the value of the land.").

266. FISCHEL, *supra* note 74, at 243 ("[C]onventional suburban zoning is inefficiently restrictive.").

267. FISCHEL, *supra* note 141, at 46 (finding that homeowners "tend to choose those policies that preserve or increase the value of their homes"). Although empirical analysis about the impact of urban agriculture ordinances on home prices would be useful, a municipality need not have foolproof evidence before enacting an "innovative solution"—they "must be given 'a reasonable opportunity to experiment with solutions.'" *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). "[A] city must have latitude to experiment, at least at the outset, and . . . very little evidence is required." *Id.* at 451 (Kennedy, J., concurring).

268. EPSTEIN, *supra* note 256, at 265; Smith, *supra* note 39, at 215 ("A strong view of private property empowers the landowner to do what she wishes with her yard. Yet the right to use one's real property as desired . . . was never conceived as absolute. . . . [T]he law of nuisance has imposed a significant set of restrictions on land use."); see also W.E. Shipley, Annotation, *Keeping Poultry as Nuisance*, 2 A.L.R.3d 965, 967 (originally published in 1965) ("The ground of attack . . . usually involved the contention that the keeping of chickens or other fowl by the defendant unreasonably interfered with the complainant's enjoyment of adjoining property because the fowl caused noise, dust and litter, or odors or pests. Whether the conditions complained of in fact existed to such a degree as to amount to a nuisance . . . has turned upon the evidence produced in the particular cases.").

prescriptive ordinance expressly allows gardens or chickens, those activities may still constitute an abatable nuisance under certain circumstances;<sup>269</sup> some municipal codes expressly state as much.<sup>270</sup> Of course, many people successfully keep chickens within residential areas without causing a nuisance.<sup>271</sup>

Some may wonder whether nuisance law will afford sufficient protection; zoning developed, in part, because nuisance suits were not effectively addressing large-scale harms.<sup>272</sup> However, Robert Ellickson suggests that small, localized land use issues, such as those that might arise if one neighbor's chickens are disturbing another neighbor, would be better addressed "through private nuisance remedies supplemented by covenants and good manners."<sup>273</sup> He continues: "The system of private nuisance law . . . avoids the allocative inefficiencies threatened by mandatory regulations or injunctions. It relies upon a decentralized policing system that is triggered more efficiently than a centralized system, and it can easily be used to internalize existing nuisances, not

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269. See, e.g., *Union Oil Co. of Cal. v. Heinsohn*, 43 F.3d 500, 504 (10th Cir. 1994) (finding that compliance with a permit does not make a party immune from common law nuisance claims); *Erwin v. Alvarez*, 752 So. 2d 1261, 1262 (Fla. Dist. Ct. App. 2000) (holding that trial court erred in finding that appellees' chickens constituted a nuisance, but that the appellees would not be in contempt as long as they limited the number of chickens to the number allowed by the county ordinance); *Valley Poultry Farms, Inc. v. Preece*, 406 S.W.2d 413, 416 (Ky. 1966) ("The keeping of poultry has been a source of much litigation . . . and it has frequently been recognized that the keeping of chickens is not a nuisance *per se* but may become a nuisance because of the circumstances or manner in which the business is operated."); *Biddix v. Henredon Furniture Indus.*, 331 S.E.2d 717, 724 (N.C. Ct. App. 1985) ("We conclude that the Clean Water Act does not abrogate the common law civil actions for private nuisance and trespass to land for pollution of waters resulting from violation of a [federal] permit."); *Vaszil v. Molnar*, 33 A.2d 743, 744 (N.J. Ch. 1943) ("The raising and maintenance of chickens ought not to be unjustifiably discouraged. . . . Perhaps at some future time, the science of breeding will produce the silent rooster and the quiet hen in company with the voiceless cat, the odorless pig and the flealess dog. Meanwhile, chickens will continue to be chickens, and if in the present cause it eventuates that the maintenance of poultry at the location selected is pursued in such conditions and circumstances as to injuriously affect the comfort of residents of ordinary sensitiveness in the vicinity, this court will not hesitate to enjoin its continuance."); Catherine J. LaCroix, *Urban Green Uses: The New Renewal*, 63 PLANNING & ENVTL. L. 3, 8 (2011).

270. See, e.g., *CITY OF L.A., CAL., MUN. CODE* § 12.03 (2012) (allowing birds as an accessory use but stating that "if the [city] determines that the keeping of birds or the keeping of a particular number of birds at a particular location constitutes a nuisance or a health or safety hazard, then the keeping of birds under those circumstance[s] shall not be an accessory use"); *TOPEKA, KAN., MUN. CODE* § 6.40.010 (2012) ("It shall be unlawful for any person to keep or maintain any domestic fowl upon any private premises in the city (when such keeping is lawful under other ordinances of the city) . . . on any premises in a manner or condition constituting a public nuisance.").

271. OLKOWSKI ET AL., *supra* note 114, at 252.

272. *Supra* notes 88-91 and accompanying text.

273. Ellickson, *supra* note 91, at 762.



merely future ones.<sup>274</sup> Thus the common law of nuisance can control localized harms in a free market system while also promoting efficient use of private property.

By allowing backyard chickens and front yard gardens, municipalities are not completely eliminating regulatory control, but rather changing the party who holds the “entitlement.”<sup>275</sup> According to the framework created by Guido Calabresi and Douglass Melamed, a governing body must first establish who has the entitlement, then determine the remedy that should be given to the party with the entitlement.<sup>276</sup> Where chickens and front yard gardens are banned, the entitlement belongs to the neighbor without chickens or a garden who is entitled to the peace and quiet of a neighborhood without the harms, or negative externalities, that urban agriculture can cause.<sup>277</sup> Once a municipality adopts a permissive urban agriculture ordinance, it places the initial entitlement with the gardener or chicken-raiser.

Urban homesteaders are thus protected by a property rule to the extent that they can engage in urban agriculture practices, as long as they comply with any health and safety or nuisance-avoiding provisions of the ordinance. Again, if they fail to comply with those provisions—if their chickens are too noisy or if their garden attracts pests—then the neighbor can bring a nuisance suit.<sup>278</sup> Thus

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274. *Id.*

275. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-93 (1972). Perhaps the time is ripe to revise allocation of entitlements precisely because underlying values are changing. “Like Coase, Calabresi and Melamed proposed that the initial allocation of entitlements would be efficient in the sense that it would minimize future transactions among parties.” Orbach & Sjöberg, *supra* note 24, at 25 (citing Calabresi & Melamed, *supra*, at 1093-94).

276. Calabresi & Melamed, *supra* note 275, at 1089-93; *see also* Orbach & Sjöberg, *supra* note 24 (discussing backyard chicken ordinances in the context of the Calabresi-Melamed framework).

277. Orbach & Sjöberg, *supra* note 24, at 14 (“Using the Coasean framework, neighbor disputes over backyard chickens illustrate the reciprocal nature of certain externalities. On the one hand, a legal rule that prevents fowl lovers from keeping poultry on their premises entails harm to households that could benefit from chicken ownership. . . . They articulate a wide range of economic, environmental, gastronomic, health, social, and emotional matters that call for the exercise of their property rights to raise chickens in their backyards. . . . On the other hand, a legal rule that permits fowl may impose discomfort and other injuries on the chicken owners’ neighbors [who] consider backyard hens and roosters to be sources of unacceptable levels of noise, smell, and health risks.”).

278. Consider what the outcome of the nuisance suit might be. Would the use have to cease? Or would the locavore pay a fine to the neighbor? Most ordinances do not address the answer. Because chickens are being kept pursuant to an ordinance, it is unlikely that a neighbor could obtain a total injunction. However, fines might be levied upon a chicken owner who did not follow provisions in the ordinance related to health, safety, or noise. Jeff

determining the allocation of entitlements has a real, important impact on how resources are allocated.<sup>279</sup>

By allocating the entitlement, either to urban homesteaders or to neighbors who do not wish to engage in urban agriculture, the city is making a value judgment about who should bear the costs of bringing action. One concern with relying on nuisance instead of zoning is the high cost associated with abatement.<sup>280</sup> If litigation is required to abate the nuisance, that remedy is beyond many neighbors' means. However, if a locality were to adopt a permissive urban agriculture ordinance, it could also put in place a public administrative system to handle neighborhood disputes related to nuisance, which Ellickson suggests would be helpful for "specialized and repetitive issues. A single adjudicative authority with exclusive jurisdiction over these cases could resolve them with greater facility and consistency than courts of general jurisdiction."<sup>281</sup> Thus localities could eliminate bans, which would increase efficiency and promote the free market and property rights, while ensuring that the availability of nuisance protection was within the means of neighborhood residents.

#### V. MOVING FORWARD: POTENTIAL SOLUTIONS AND BROADER IMPLICATIONS

This Part will propose steps that municipalities can take as they move toward more permissive views of urban agriculture, including specific approaches to permitting those uses.<sup>282</sup> This Part will also

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L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 802 (1986) ("[There is now] a general presumption against unconditional injunctive relief for prevailing plaintiffs. Plaintiffs generally would be limited to recovering damages, with injunctive relief being available only when the defendant's conduct was egregious or when it threatened the safety or personal liberty of the plaintiff." (footnote omitted)) (discussing Ellickson, *Alternatives to Zoning*, *supra* note 91, and Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977)).

279. Lewin, *supra* note 278, at 794 ("[A]s suggested by the Coase Theorem, in the real world in which transaction costs are not zero, the assignment of entitlements has an impact on resource allocation.").

280. Ellickson, *supra* note 91, at 762.

281. *Id.*

282. There exists a thin amount of legal academic literature on urban agriculture ordinances and specifically the structure of ordinances addressing backyard chickens. See Orbach & Sjoberg, *supra* note 24, at 16-17; see also Mukherji & Morales, *supra* note 17 (addressing different zoning approaches that can be used to allow urban agriculture); Salkin, *supra* note 62, at 4-7 (discussing different approaches to backyard chicken ordinances). Because these articles do an admirable job of compiling many of the existing urban agriculture ordinances, I will not repeat that task here.

discuss what the lifting of urban agriculture bans suggests about the future of land use law.

### A. *Zoning, Comprehensive Plans, and Covenants*

The most straightforward approach that a municipality could take in pursuit of more locavore-friendly practices would be to revise its comprehensive plan and zoning code to eliminate any provisions that expressly ban urban agriculture or that make it more difficult for individuals to use their property for agriculture. There are generally two different approaches for the treatment of a land use issue like urban agriculture: it can be treated as a use or a district.<sup>283</sup>

If it is to be treated as a district, the municipality should begin by examining its land use plan.<sup>284</sup> If there is an existing designation for general agriculture, the municipality should consider whether it makes sense to use that land use category, or to create a new, separate category for urban agriculture, which could be applied as an overlay district within the residential, commercial, and/or industrial areas of the city.<sup>285</sup> If the municipality prefers to treat urban agriculture as a use, which this Article contends will usually make more sense, it should first ensure that the comprehensive plan will allow such a use, and then create a new use designation for urban agriculture practices. The category should expressly allow uses such as front yard gardens, backyard chickens, sale of produce or value-added products, and any other agricultural uses that the municipality believes are important to its residents.

This could then be added as a use that is permitted either “as of right” or conditionally in various existing zoning districts. In order to be truly permissive, localities should allow urban agriculture as a principal or accessory as-of-right use and not require any type of

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283. Mukherji & Morales, *supra* note 17, at 4 (proposing these two approaches for the treatment of urban agriculture).

284. For example, San Francisco’s mayor directed the planning department to “integrate policies and implementing actions to support San Francisco’s food policy goals into elements of” the General Plan. OFFICE OF THE MAYOR, CITY & CNTY. OF S.F., EXECUTIVE DIRECTIVE 09-03: HEALTHY AND SUSTAINABLE FOOD FOR SAN FRANCISCO 4 (2009), [http://www.sfgov3.org/ftp/uploadedfiles/sffood/policy\\_reports/MayorNewsomExecutiveDirectiveonHealthySustainableFood.pdf](http://www.sfgov3.org/ftp/uploadedfiles/sffood/policy_reports/MayorNewsomExecutiveDirectiveonHealthySustainableFood.pdf).

285. For example, “Boston . . . has the Olmsted Green Smart Growth Overlay Zone, where there is a use category for food production uses, including a farm, garden, food production center . . . permitted in the mixed use part of the zone.” Mukherji & Morales, *supra* note 17, at 6 (internal quotation marks omitted).

permit.<sup>286</sup> A municipality may still impose certain requirements on uses that are permitted as of right, such as a limit on the number of chickens or the size or location of the garden<sup>287</sup> or a requirement that the urban homesteaders pay a small fee before conducting these activities on their property if the activity will exceed a certain size.<sup>288</sup>

The municipality might instead choose to require a CUP for urban agriculture, although this would be moving away from allowing truly permissive use.<sup>289</sup> If the locality has concerns about soil safety, one condition of permit approval could be to require an environmental assessment to ensure that the soil would be suitable for gardening.<sup>290</sup> Or a jurisdiction might allow urban agricultural activities that can be shown not to create “significant objectionable influences in residential areas.”<sup>291</sup> Though CUPs provide a locality with more control over the use, they also typically involve even greater barriers to entry than as-of-right permits because they are typically quite expensive.<sup>292</sup> Localities should therefore consider their underlying goals for urban agriculture before instituting such conditional requirements. If their primary purpose is to aid low-income families, to address food

286. See, e.g., Wood et al., *supra* note 3, at 76 (suggesting that permits are unnecessary because neighbors can rely on nuisance suits, and “a permit system would strain local government resources and potentially discourage homeowners from keeping microlivestock”).

287. See, e.g., MOBILE, ALA., CODE § 7-103(d) (2012) (requiring coops to be 20 feet from a property line); CHEROKEE CNTY., GA., ZONING ORDINANCE § 7.7-24(a)(1)(iv) (2012) (25 feet from a property line); NAPLES, FLA., ZONING CODE § 58-52(5) (2012) (30 feet from a property line). See generally Salkin, *supra* note 62, at 5-7.

288. See Seattle, Wash., Ordinance 123,378 (Aug. 16, 2010).

289. Mukherji & Morales, *supra* note 17, at 5 (“[C]ities may want to foster intensive urban agriculture through permissive uses, but to prevent nuisance they may want to limit the extent of those uses—either by making the use conditional or by confining it to specific districts.”).

290. A model community-garden ordinance imposes a similar requirement: “Site users must provide a Phase I Environmental Site Assessment (ESA). Any historical sources of contamination identified in the ESA must be tested to determine type and level of contamination; appropriate remediation procedures must be undertaken to ensure that soil is suitable for gardening.” PLANNING FOR HEALTHY PLACES, PUB. HEALTH L. & POL’Y, ESTABLISHING LAND USE PROTECTIONS FOR COMMUNITY GARDENS 11 (2009), [http://www.michigan.gov/documents/mdch/communitygardenpolicies\\_303374\\_7.pdf](http://www.michigan.gov/documents/mdch/communitygardenpolicies_303374_7.pdf).

291. N.Y.C., N.Y., ZONING RESOLUTION § 22-14 (2011) (describing Use Group 4).

292. See, e.g., CITY OF SAN JOSE, PLANNING APPLICATION FILING FEE SCHEDULE 3 (2011), [http://www.sanjoseca.gov/planning/pdf/11-12\\_Fee\\_Schedule.pdf](http://www.sanjoseca.gov/planning/pdf/11-12_Fee_Schedule.pdf) (costing \$2250); DEP’T OF PLANNING & DEV. REVIEW, RICHMOND, VA., APPLICATION FOR CONDITIONAL USE PERMIT 4 (Sept. 8, 2010), <http://www.richmondgov.com/planninganddevelopmentreview/forms/ConditionalUsePermit.pdf> (costing \$1100); LOUISVILLE METRO PLANNING & DESIGN SERVS., CONDITIONAL USE PERMIT SUBMITTAL REQUIREMENTS (2004), <http://www.louisvilleky.gov/NR/rdonlyres/18D552E4-6FBD-4E8E-996F-E5B41B5EAD03/0/CUPN0v27.pdf> (costing \$775).

insecurity, or to enable those in food deserts to harvest their own food, certain requirements might inhibit those ends, especially in neighborhoods that lack large lots.<sup>293</sup>

Once a municipality has determined which approach it will use, it should also determine whether relevant private covenants exist in its jurisdiction. A very large number of suburban homes in the United States are subject to CC&Rs, which are designed to ensure a level of consistency and expectations.<sup>294</sup> Even if the zoning ordinance would permit backyard chickens or front yard gardens, the restrictive covenants often prohibit such uses.

When a zoning ordinance is in conflict with a private covenant, the more restrictive typically prevails, which in this instance would be the covenant barring chickens or gardens.<sup>295</sup> However, if a covenant is deemed to be against public policy, it may be struck down.<sup>296</sup> As localities and states place more emphasis on sustainable policies, such a finding is possible. For example, restrictions that prohibit solar energy devices have been deemed void in California via statute because “it is the policy of the state to promote and encourage the use of solar energy systems and to remove obstacles thereto.”<sup>297</sup> Similar findings could be made to void covenants that prevent urban agriculture in residential areas.<sup>298</sup> This would likely not result in a violation of the Contract Clause,<sup>299</sup> which only permits the government to substantially impair existing private contracts if (1) there is “a

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293. A 150-foot setback “effectively limits backyard chicken raising to single-family homes on large lots.” Salkin, *supra* note 62, at 6.

294. CC&Rs may regulate house color, awning patterns, or the length of the front lawn. See ELLICKSON & BEEN, *supra* note 20, at 596 (discussing CC&Rs governing design); sources cited *supra* note 93. In 2012, approximately 25.9 million homes were governed by associations. *Industry Data: National Statistics*, CMTY. ASS’NS INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Nov. 27, 2012).

295. *Inabinet v. Booe*, 202 S.E.2d 643, 644–45 (S.C. 1974); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. c (2000).

296. “The test of whether a contractual provision violates public policy is ‘whether the contract as made has a “tendency to evil,” to be against the public good, or to be injurious to the public.’” *Thayer v. Thompson*, 677 P.2d 787, 789 (Wash. Ct. App. 1984) (quoting *Golberg v. Sanglier*, 616 P.2d 1239, 1247 (Wash. Ct. App. 1980)).

297. CAL. CIV. CODE § 714 (2011); see John Wiley, Comment, *Solar Energy and Restrictive Covenants: The Conflict Between Public Policy and Private Zoning*, 67 CALIF. L. REV. 350, 350–54 (1979) (“Although remedial doctrines may grant solar consumers some relief, it is concluded that only legislative action can implement a social policy favoring solar energy by preempting private covenants. A modified version of the California statute is advocated for adoption in other states.”).

298. *Supra* Part III.

299. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem,”<sup>300</sup> and if (2) “the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’”<sup>301</sup> Here, the state or locality would have a strong argument that the purpose of the regulation would be to remedy the broad social issues that are associated with industrial agriculture and that can be improved by permissive urban agriculture policies.

### *B. Sustainability Plans and Goals*

A number of U.S. municipalities have recently begun to regulate in furtherance of the public health and safety through the adoption of new “climate protection” or “sustainability” plans.<sup>302</sup> These plans may be stand-alone documents or included as goals or provisions in an existing comprehensive plan establishing sustainability as an important pursuit of new regulations and development.<sup>303</sup> Many municipal governments have created special departments responsible for administering their sustainability plans.<sup>304</sup> Some commentators have

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300. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983) (citation omitted).

301. *Id.* at 412 (alterations in original) (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977)).

302. See, e.g., BALT. OFFICE OF SUSTAINABILITY, BALT. CITY COUNCIL, THE BALTIMORE SUSTAINABILITY PLAN (2009), [http://www.baltimoresustainability.org/uploads/Files/Sustainability\\_Plan.pdf](http://www.baltimoresustainability.org/uploads/Files/Sustainability_Plan.pdf); CITY OF KAN. CITY, MO., CLIMATE PROTECTION PLAN (2008), <http://www.kcmo.org/idc/groups/citymanager/documents/citymanagersoffice/022729.pdf>; see also Peters, *supra* note 22, at 206 (“Establishing a sustainable urban agricultural system would reduce the environmental degradation that is caused by modern agricultural practices, reduce the financial strain on government resources by increasing urban productivity and enabling urbanites to grow a local food supply, and reduce socioeconomic disparities by providing less-advantaged populations in urban areas with access to an adequate supply of fresh, nutritious food.”).

303. In Kansas City, the city manager must answer the question on the fact sheet for all ordinances and resolutions: “How will this contribute to a sustainable Kansas City?” Kan. City, Mo., Resolution 080246 (May 8, 2008).

304. See, e.g., BALT. OFFICE OF SUSTAINABILITY, <http://www.baltimoresustainability.org/> (last visited Nov. 27, 2012); *Environment Department*, CITY & CNTY. OF S.F., <http://www6.sfgov.org/index.aspx?page=109> (last visited Nov. 27, 2012); *Environmental & Energy Services*, CITY OF BOS., <http://www.cityofboston.gov/environmentalandenergy/> (last visited Nov. 27, 2012); *Office of Environmental Quality*, CITY OF KAN. CITY, MO., <http://www.kcmo.org/CKCMO/Depts/CityManagersOffice/OfficeofEnvironmentalQuality/index.htm> (last visited Nov. 27, 2012); *Office of Sustainability*, CITY OF ATLANTA, <http://www.atlantaga.gov/index.aspx?page=18> (last visited Nov. 27, 2012); *Office of Sustainability*, CITY OF CLEVELAND, OHIO, <http://www.city.cleveland.oh.us/CityofCleveland/>

suggested that this is part of an “emerging international environmental norm” that there is a duty among developed nations to alleviate contributions to climate change.<sup>305</sup>

While many of these sustainability plans address issues such as transportation, green building, and high-density development, a next step is to include local food production.<sup>306</sup> Urban agriculture can substantially contribute to green goals that many localities are actively trying to further,<sup>307</sup> indeed, some cities have begun to include food shed analysis and local food policies in their comprehensive or sustainability plans.<sup>308</sup> For example, the Baltimore Sustainability Plan recognizes the “growing movement to utilize urban land for agriculture as a means of providing fresh food to communities” and finds that such an approach “would reduce fuel use and greenhouse gas emissions.”<sup>309</sup> One goal of the plan is to “[e]stablish Baltimore as a leader in sustainable, local food systems,” in pursuit of which the city has devised a number of strategies, including the development of an urban agriculture plan, altering zoning to allow for production and sale of urban agricultural products, and increasing the percentage of agricultural land in the city.<sup>310</sup> Kansas City, Missouri, has a Climate Protection Plan that sets a goal of 10,000 vegetable gardens and promotes residential neighborhood food production through methods that reduce greenhouse gas emissions and sequester carbon.<sup>311</sup> And

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Home/Government/CityAgencies/OfficeOfSustainability (last visited Nov. 27, 2012); *Office of Sustainability and Environment*, SEATTLE.GOV, <http://www.seattle.gov/environment/> (last visited Nov. 27, 2012); *Sustainable Sacramento*, DEP’T OF GEN. SERV., CITY OF SACRAMENTO, <http://www.cityofsacramento.org/generalservices/sustainability/> (last visited Nov. 27, 2012).

305. Medina & Tarlock, *supra* note 105, at 1743, 1756 (“[C]omprehensive land-use planning may be the better, more comprehensive tool for reducing greenhouse gas emissions.”).

306. NORDAHL, *supra* note 16, at 107 (“If a city is truly interested in ‘going green,’ as many are, food has to be considered an integral part of sustainability.”). Cleveland, Ohio, recently adopted an ordinance offering a “bid discount” and a “Preference for Local Producers, Local-Food Purchasers, and Local Sustainable Businesses” who apply for a contract with the city. CLEVELAND, OHIO, CODE § 187A.02 (2012); see Morales & Kettles, *supra* note 76, at 38 (“Pressure for sustainable and livable cities, and demands from food policy advocates, is compelling cities to reorganize right of ways and zoning [related to food trucks and farmers’ markets].”).

307. For example, people who grow their own food seasonally will take fewer car trips to the local supermarket. Those supermarkets can thus reduce the amount of food on their shelves, which will contribute to a decrease in emissions both from food transportation and production. *Supra* Part IV.A.2.a. But cf. *supra* notes 227-229 and accompanying text.

308. Salkin & Lavine, *supra* note 9, at 600.

309. BALT. OFFICE OF SUSTAINABILITY, *supra* note 302, at 70.

310. *Id.* at 74.

311. CITY OF KAN. CITY, MO., PROGRESS REPORT ON CLIMATE PROTECTION app. A, at 24 (2008), <http://www.kcmo.org/idc/groups/citymanager/documents/citymanagersoffice/>

Chicago's Eat Local Live Healthy plan includes increased food production in neighborhoods and increased knowledge of urban farming and composting as goals.<sup>312</sup> Many other cities are following suit.<sup>313</sup> Thus a number of local governments have recognized that creating urban agriculture policies and plans can assist them in furthering broader sustainability goals.

### C. *Broader Implications: The Fall of Euclidean Zoning?*

As sustainability has become more important to many citizens and municipalities, there has been a concomitant recognition that perhaps Euclidean zoning cannot sufficiently address modern challenges and sustainable development goals.<sup>314</sup> The move toward permissive views of urban agriculture is a reversal of the key premise of early zoning ordinances: that single-family homes had to be protected from agriculture. Change inheres in the adoption of urban agriculture policies, new urbanism, smart growth, and form-based codes, and how neighbors interact in a system of fewer regulations.<sup>315</sup> This Part sketches the broader implications of this movement.

Challenges to traditional Euclidean zoning have been asserted for many years,<sup>316</sup> though its critics have become more vocal and powerful

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022732.pdf; CITY OF KAN. CITY, MO., PROGRESS REPORT ON CLIMATE PROTECTION app. B, at 14 (2008), <http://www.kcmo.org/idc/groups/citymanager/documents/citymanagersoffice/022733.pdf> (recommending similar advice to this Article, including the revision of local ordinances "to explicitly allow tall garden plants, front yard gardens, and cover crops" and the elimination of codes "that are barriers to produce stands/farmers markets in neighborhoods").

312. DEP'T OF PLANNING & DEV., CITY OF CHI., CHICAGO: EAT LOCAL LIVE HEALTHY 2, 16 (2007), [http://www.cityofchicago.org/content/dam/city/depts/zlup/Sustainable\\_Development/Publications/Eat\\_Local\\_Live\\_Healthy\\_Brochure/Eat\\_Local\\_Live\\_Healthy.pdf](http://www.cityofchicago.org/content/dam/city/depts/zlup/Sustainable_Development/Publications/Eat_Local_Live_Healthy_Brochure/Eat_Local_Live_Healthy.pdf) (identifying "food issues that, if restructured locally, could improve food quality, lower its cost and increase its availability for consumers").

313. For example, Oakland, California, is undertaking a comprehensive urban agriculture update to implement policies in the Open Space and Conservation Element of its General and Climate Action Plans. *Urban Agriculture Citywide Update*, CITY OF OAKLAND, CAL., <http://www2.oaklandnet.com/Government/o/PBN/ourOrganization/PlanningZoning/OAK029859> (last visited Nov. 27, 2012). San Francisco's goals include supporting urban agriculture through modification of zoning ordinances, horticulture education, and incentivizing ownership of some small livestock. *ROOTS OF CHANGE*, *supra* note 224, at 8.

314. Salkin, *supra* note 19, at 788.

315. There is an emerging but thin amount of scholarly literature discussing form-based codes. See CHAD EMERSON, *THE SMARTCODE SOLUTION TO SPRAWL* (2007); Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVT'L. L. 395, 396 (2008); Lolita Buckner Inniss, *Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?*, 11 U. PA. J.L. & SOC. CHANGE 75, 75 (2007-2008).

316. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 784-85 (2003) ("Practitioners and



in recent times.<sup>317</sup> Further, zoning laws themselves have changed over time. Joseph Sax links the change in laws to changes in views about what we need to protect: “Many things considered harmful today were once legal and commonplace. If views about what is harmful cannot change to reflect contemporary conditions and values, property owners may be afforded stability but property is rendered dysfunctional to society.”<sup>318</sup> The opposite is also true: maintaining bans on urban agriculture might render property and expectations stable, but the emerging view is that urban agriculture is a beneficial and acceptable use in a residential area.<sup>319</sup> Unless zoning laws change to reflect contemporary views of health, safety, and community values, property ownership becomes dysfunctional. Thus a movement toward more beneficial property uses protects the utility of property in a changing society.<sup>320</sup>

The removal of urban agriculture bans is a form of regulatory minimalism—a movement away from centralized legal authority and toward deregulation. Some theorists assert that law is not always necessary for people to coordinate their behaviors and use of land. Economist Charles Lindblom suggests, “people can coordinate with each other without anyone’s coordinating them, without a dominant common purpose, and without rules that fully prescribe their relations to each other.”<sup>321</sup> Ellickson’s study of ranchers in Shasta County, California, would support this line of reasoning: neighbors who live in an area that adopts a permissive urban agriculture ordinance will find ways to coordinate with each other—through informal social norms

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academics became aware of the failures of traditional zoning as early as the 1940s, while zoning was still in its infancy”).

317. See generally ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000) (discussing the problems associated with sprawl and proposing solutions to those problems).

318. Peggy B. Johnson, *The Takings Issue in the Local Government and Watershed Context*, 1995 DETROIT C.L. REV. 17, 31 (internal quotation marks omitted).

319. Consider the reliance interests of neighbors living in areas with bans who do not want to use their property for urban agricultural purposes. They likely purchased homes with expectations, including the existence of the ban. If the locality then liberalizes the law, they might argue that a taking has occurred, or at least that the new, permissive ordinances constitute a change that harms them in their use and enjoyment of their property based on their reasonable expectations.

320. See Salkin, *supra* note 2, at 147–48 (“[T]ransformation of American land use law from an arcane technique designed to separate different types of uses, to a recognition that land use law, policy and practice have evolved into a much more dynamic network of locally adopted laws and regulations designed to . . . promote sound environmental protection goals.”).

321. CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 3–5 (1965) (describing “mutual adjustment”).

and good manners—without the need for regulation.<sup>322</sup> However, there is some suggestion that those norms are only persuasive means of coordinating groups of neighbors when people live in small, close-knit communities.<sup>323</sup> So, while mutual adjustment may work successfully in some suburban neighborhoods where turnover in homeownership is low, in larger, denser, and more urban areas, informal coordination might not be sufficient to resolve all disputes.<sup>324</sup>

Although some communities still hold to traditional Euclidean values to attract residents who hold those same values, traditional conceptions of morality are slowly beginning to change in some parts of the country.<sup>325</sup> Though zoning is communitarian, the concern for protection of only a certain segment of the community through zoning (for example, upper-middle-class, single-family homeowners) is being replaced by a concern for the broader community.<sup>326</sup> These changes are embodied in the emergence of the sustainable development ideal that underscores many new comprehensive plans and through a change in norms, as localities begin to prioritize the benefits of urban agriculture

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322. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (studying informal norms governing boundary fences); *see also* Ellickson, *supra* note 91, at 685 (discussing norms and manners).

323. ELLICKSON, *supra* note 322; *see also* ELLICKSON & BEEN, *supra* note 20, at 39 (“The more closely-knit a group of residents and landowners, the more likely they are to succeed in exercising informal social controls to settle land use disputes at the micro level” and that “[a]s the number of neighbors affected by a conflict grows . . . bottom-up cooperation becomes more difficult.”).

324. If manners are not sufficient, Ellickson notes that government can aid resolution of problems while still maintaining a decentralized approach to the distribution of property rights; it does this by enforcing covenants and nuisance protections. Ellickson, *supra* note 91, at 686.

325. *See supra* Part III.A.

326. This is not only true in the United States. For example, the United Kingdom’s Countryside and Rights of Way Act provides for a “right to roam” over certain privately-owned but natural land in England and Wales for the purpose of “‘improving public health[,] reducing social divisions’ and [establishing] a degree of ‘social equity.’” JESSE DUKEMINIER ET AL., *PROPERTY* 812 (7th ed. 2010) (quoting KEVIN GRAY & SUSAN FRANCIS GRAY, *ELEMENTS OF LAND LAW* 1372 (5th ed. 2009)); *see also* *Atl. Coast Line R.R. Co. v. City of Goldsboro, N.C.*, 232 U.S. 548, 559 (1914) (stating that regulation under the police power must be “designed to promote the health, comfort, safety, or welfare of the community”); Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims after Property Transfers*, 36 CONN. L. REV. 7, 16-17 (2003) (“It is well established that government may regulate, by exercise of its police power, in a way that burdens the individual’s use and enjoyment of his private property. . . . Notwithstanding the essential nature of the police power to government, the United States Supreme Court maintains that limitations exist on a sovereign’s ability to regulate the uses to which private citizens may put their property.” (footnotes omitted)).

over the perceived harms.<sup>327</sup> Although prescriptive noise ordinances may govern the extent to which a barking dog can go on before neighbors have a right to complain, those ordinances rarely limit a homeowner from keeping a dog. This is because the norm favors dog ownership in residential areas. As more localities realize the benefits that flow from urban agriculture, perhaps those norms will also change. The hen itself may someday be welcomed into the neighborhood, as long as its clucking and odors are managed.

## VI. CONCLUSION

Everything old is new again, and so it is with land use.<sup>328</sup> In the days before zoning ordinances, mixed-use communities developed to accommodate the needs of a public that walked to work and to the market. Many of those community members grew their own produce or raised chickens out of necessity. Although Euclidean zoning stepped in to separate conflicting uses nearly one hundred years ago, many communities are pursuing a return to a mix of uses amidst recognition that Euclidean zoning was a direct cause of sprawl and unsustainable development in the United States.<sup>329</sup> This Article has demonstrated that although there are some valid reasons for banning urban agricultural uses, those justifications are often antiquated and outweighed by more current conceptions of beneficial and harmful uses of land. As views about what actions are appropriate in a residential area change, local governments should revise their ordinances to reflect current conceptions of harm. The potential for a large-scale downward shift in demand for industrial agriculture is possible as more municipalities begin to overturn their urban

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327. *Supra* Part IVB; see, e.g., DEP'T OF PLANNING & DEV., CITY OF SEATTLE COMPREHENSIVE PLAN: TOWARD A SUSTAINABLE SEATTLE (2005), [http://www.seattle.gov/DPD/cms/groups/pan/@pan/@plan/@proj/documents/web\\_informational/dpdp022305.pdf](http://www.seattle.gov/DPD/cms/groups/pan/@pan/@plan/@proj/documents/web_informational/dpdp022305.pdf) ("Sustainable cities use resources efficiently and effectively. They reuse and recycle. . . . They use existing local resources where they can. They minimize exportation of environmental risk. They provide physical and economic security, and they distribute these and other benefits evenly."); *Kansas City's Comprehensive Plan*, CITY OF KAN. CITY, MO., <http://www.kcmo.org/CKCMO/Depts/CityPlanningandDevelopment/AdoptedPlans/FOCUS/index.htm> (last visited Nov. 27, 2012) ("Kansas City shapes and guarantees its future by examining first and foremost the impact of every decision on future generations.").

328. See *Portlandia: Dream of the 1890s*, INDEPENDENT FILM CHANNEL, <http://www.ifc.com/portlandia/videos/portlandia-dream-of-the-1890s> (last visited Nov. 27, 2012) (suggesting that pickling, raising chickens, and curing one's own meats, which were popular in the late 1800s, have returned to the forefront of popular culture).

329. Nicolas M. Kublicki, *Innovative Solutions to Euclidean Sprawl*, 31 *Envtl. L. Rep.* (Envtl. Law Inst.) 11,001, 11,002 (Aug. 2001) ("Euclidean zoning has resulted in cities that expand outward rapidly due to their inability to combine land uses and grow vertically.").

agriculture bans. Although a single locavore growing tomatoes and collecting their pet chickens' eggs might not greatly contribute to a sustainable future, multiple locavores, across multiple jurisdictions, undertaking those same actions, certainly will. Zoning and land use laws are flexible enough to change to reflect contemporary values; however, local governments must be willing to take steps toward making that change.